

No. 2951

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United States  
Circuit Court of Appeals<sub>4</sub>  
For the Ninth Circuit.

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AMERICAN SURETY COMPANY OF NEW  
YORK, a Corporation,

Plaintiff in Error,

vs.

PETER SANDBERG and MATILDA SAND-  
BERG, His Wife,

Defendants in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court of the  
Western District of Washington, Southern Division.

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Filed

APR 3 - 1917

F. D. Monckton,

Clerk

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Circuit Court of Appeals

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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CHARLES O. BATES, Esquire, 1107 National  
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CHARLES T. PETERSON, Esquire, 1107 National  
Realty Building, Tacoma, Washington,  
Attorneys for the Defendants in Error.

[1\*]

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*In the District Court of the United States for the  
Western District of Washington, Southern Divi-  
sion.*

No. 1605.

AMERICAN SURETY COMPANY OF NEW  
YORK, a Corporation,  
Plaintiff,

vs.

PETER SANDBERG and MATHILDA SAND-  
BERG, His Wife,  
Defendants.

**Praeceptum for Transcript of Record.**

Filed February 21, 1917.

To the Clerk of the Above-named Court:

You will please prepare and certify to constitute  
the record on appeal in the above-entitled case type-

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\*Page-number appearing at foot of page of original certified Transcript  
of Record.

written copies of the following papers, omitting all captions, excepting on the first page, omitting also all verifications, acceptances of service and other endorsements, excepting filing marks, said transcript of the record to be forwarded to and filed in the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, to be printed there according to the rules of said Circuit Court of Appeals:

Original complaint.

Answer of the defendants as first filed.

Motion against that answer.

Order on ruling of Court on motion against that answer.

Reply of the plaintiff to the answers of the defendants.

Separate answer of Mathilda Sandberg filed at the time of trial .

Stipulation to try the case to the Court.

Stipulation about the exhibits.

Various orders for extension of time.

Bill of exceptions.

Findings of fact requested by the plaintiff.

Order denying these findings of fact.

Findings of fact requested by the defendants.

Exceptions of the plaintiff to the findings of fact as made by the Court.

Findings of fact as made by the Court. [2]

Judgment order and decree as made by the Court.

Stipulation about the exhibits and the order *or* the Court thereon for their transmission to the Circuit Court of Appeals.

Decision of the Court on the merits.

The petition for writ of error.

Order allowing the same.

Bond thereon.

Assignments of errors.

W. C. BRISTOL,  
Attorney for Plaintiff.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 21, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [3]

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**Complaint.**

To the Honorable Judges of the Above-entitled Court:

The complaint of American Surety Company of New York exhibited by its attorneys thereunto authorized, against Peter Sandberg and Mathilda Sandberg, husband and wife, doth respectfully show, allege and represent:

Par. I.

That American Surety Company of New York is and was at all the times herein set forth a corporation created, organized and existing under and by virtue of the laws of the State of New York; that its principal office and place of business is and has been at all the times herein set forth in the city and State of New York; that it is authorized to do business in the State of Washington and is a duly licensed surety company in said State; that it is now a citizen and resident of the State of New York and not a citizen or resident of the State of Washington.

Par. II.

That Peter Sandberg and Mathilda Sandberg are husband and wife and both of them were at all the times herein mentioned and are now citizens and residents of the State of Washington and not of the State of New York and reside and have their fixed domicile in the city of Tacoma in the county of Pierce in the said State of Washington. [4]

Par. III.

That the plaintiff and the respective defendants are citizens and residents of different states and not of the same state.

Par. IV.

That the amount or value in controversy in this cause, exclusive of interest and costs, is more than the sum of three thousand dollars.

Par. V.

That Wells Construction Co. was at the times herein set forth a corporation created, organized and existing under the laws of the State of Washington and registered in British Columbia under the British Companies Act with a registered office in Vancouver in the Province of British Columbia, with its principal office and place of business in the city of Tacoma and State of Washington, and upon the 2d day of June, 1910, through its secretary, Joe Wells, made an application in words and figures as follows, to wit, for a correct bond as therein specified:

F. Reamended. 16M, 9'09.

Form C.

*vs. Peter Sandberg and Matilda Sandberg.* 5

State—Vancouver, B. C.

Agency—F. B. Lewis.

AMERICAN SURETY COMPANY.

of New York.

A. No. 78

Bond No. 797682

Capital and Surplus, \$5,500,000.

APPLICATION FOR CONTRACT OR BID  
BOND.

Amount—\$25,000.00

NOTE—These should accompany this application:

1. Financial Statement, Form C 413 with schedules. [5]
2. Copy of Contract, or in case of a bid, of advertisement, instruction and bid showing date and signatures. (Copy contract to follow.)
3. Copy of specifications, and of every contract, franchise or other document referred to in, made part of or governing the contract or bid. Plans as a rule not necessary.

Company's Office

Building

100 Broadway, N. Y.

Premium \$875.00

Place and Date

of this

Application.

Vancouver, B. C.

(Place)

June 2nd, 1910.

(Date)

To American Surety Company of New York:

Application is hereby made for a bond of suretyship, as follows:

1. Name, age, business address and residence.

In the case of a partnership add name and residence of each partner; in the case of a corporation add names and residences of the four principal officers, and state date of organization, or incorporation, name principal holders of stock and bonds, if any.)

Wells Construction Company, a Company registered in B. C. of Tacoma, Washington, U. S. A. J. P. Wells, Manager and secretary, Simon Mettler, President; Geo. E. Vergowe, Vice-President.

2. Name and address of obligee: Powell River Paper Company, of Vancouver, B. C.

(If an agent, officer or board, give full description as per contract, specifications and bond.)

3. Place and date of bid opening, if any.

Bid. )

4. Contract) for construction of dam and canal on Powell River, B. C.

5. Bid )

Contract) dated.

Bid ) Price approxi

6. Contract) mate \$175,000.

7. Time for Completion: October 31st, 1910.
8. Penalty for delay: Not stated.
9. Grounds for extension of time:
10. Terms of payment, reserved percentage: 85% monthly—15% Reserve.
11. Does contract cover patent indemnity?
12. Terms and duration of guarantees of efficiency, maintenance and repairs, if any, in contract or specifications: None.
13. Date of bond: \_\_\_\_\_.
14. Amount of bond: \$25,000. [6]
15. If a bid bond, will it operate as a contract bond? \_\_\_\_\_
16. If a bid bond, not to operate, as a contract bond, amount of contract bond will be \$\_\_\_\_\_; if not specified, then the amount in which surety on contract bond must justify will be, \$\_\_\_\_\_.
17. Limit on time for suit: \_\_\_\_\_.
18. Name, title and address of architect or engineer in charge: N. O. Hardy.
19. If you bid for the contract, give other bids including highest and lowest:

Name.	Address.	Bid.
	No others.	
20. State nature of business, and if carried on in other States, territories or countries, specify the same: \_\_\_\_\_ General Contractors, Vancouver, B. C., & Tacoma, Washington.
21. State number years previous experience as contractor: 10 years.
22. What other contracts have you on hand?

8 *American Surety Company of New York*

State contract price in each case and percentage of work completed:

Paving contract in Tacoma, \$130,000, 70% completed.

Storm Sewer Contract in Tacoma, \$24,612, 80% completed done in 40 days.

8 Story Building in Tacoma, \$45,000, 95% completed to be completed 15 June.

Metropolitan Bldg. in Vancouver, \$57,000, 5% completed.

Pacific Development Co. — excavation, 12000 25% completed.

Not taking any more work in Tacoma.

23. What arrangements have you made for supplies, materials, subcontracts, etc., in connection with the work provided for in said contract? Owner to furnish all materials—not subcontracting.
24. Do you carry life insurance? Name companies and amounts: Yes, all the principal officers carry from \$5,000 to \$35,000.
25. Do you carry employers' liability insurance? Name companies and amounts: Yes.
26. If you bid for the contract did you give a proposal bond? If so, state amount and names and residences of your sureties: No.
27. Have you ever applied to any other source for a bond for this contract? If so, state when, and to whom, and with what result: No.
28. Have you furnished bonds before? Give names of your sureties. What bonds are now outstanding? Yes. Principally by the



Title Guarantee & Surety Co. of Scranton,  
[7] Pa. \$164,000 Bonds outstanding in  
Tacoma.

29. Are you engaged or interested in any other line of business? If, so, state its nature, location, firm name, names of partners, etc.:  
No.
30. Have you, or if a firm or corporation, has said firm or corporation, or any firm or corporation or individual to which it is a successor, or any member of said firm, ever compromised with its or his creditors, or become bankrupt or in any other way become discharged from its or his debts otherwise than by payment thereof in full? If so, state details thereof, in full, in confidential letter to be annexed: No.
31. References. (Bankers, merchants, supply houses and others with whom you have had contracts, preferred.)

Name.	Occupation.	Address.
Peter Sandberg,	Capitalist,	Tacoma, Wash.
John W. Link,	" ex-Mayor,	Tacoma, Wash.
Pacific National Bank,		" "
Stebbens, Walker Spinning,	Wholesale	" "
Tacoma Trading Company,	material men.	Tacoma, "

Should the AMERICAN SURETY COMPANY OF NEW YORK, hereinafter called the Surety, execute or procure the execution of the suretyship hereinbefore applied for, or other suretyship in lieu thereof, the undersigned, hereinafter called the Indemnitor, do hereby, in consideration thereof, jointly and severally undertake and agree:

- I. That the statements contained in the forego-

ing application are true.

II. That the indemnitor will immediately pay the Surety at its office, 100 Broadway, New York City, \$875 and \$875 on the 2d day of June in each year hereafter and until the indemnitor shall serve upon the Surety competent, written, legal evidence of its final discharge from such suretyship, and all liability by reason thereof, and any and all renewals and extensions of the same, and the expiration, without appeal or proceedings to review, of the time to appeal from or review any adjudication or determination directly or indirectly fixing or discharging such liability.

III. That in the event of said Surety executing as surety or procuring the execution by sureties of the contract bond or bonds, required to be given if said contract or contracts be awarded to the applicant, or if said bond or bonds now applied for shall operate as such contract bond or bonds, or in the event of a contract being awarded and no contract bond required, the indemnitor will pay it, said Surety — per cent of the amount of such contract, award or orders annually in advance (no premium to be less than Ten Dollars, however); and the indemnitor does also agree that all the terms and conditions of this agreement shall cover and apply to the contract bond or bonds so executed.

IV. That the indemnitor will perform all the conditions of said [8] bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from and

against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same.

V. That upon the making of any demand, or the giving of any notice, or the institution of any proceeding preliminary to determining or fixing any liability which the Surety may be called upon to discharge by reason of such suretyship, and any and all renewals and extensions thereof, the indemnitor will immediately notify the Surety thereof in writing at its said office.

VI. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety, to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety's intent so to do, or on making such request, place the Surety in possession of funds or securities, approved by it sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding

from the State Court to the Federal Court, in any State where such action would in any way affect the Surety's license or right to transact business.

VII. That the indemnitor will, upon the request of the Surety, procure the discharge of the Surety from said suretyship, and all liability by reason thereof, and any and all renewals and extensions thereof.

VIII. That the Surety shall, at its option, have and may exercise, in the name of the indemnitor, or otherwise, any right, or remedy, or demand which the indemnitor may have for the recovery of any sums paid by the Surety by virtue of its suretyship, and any and all extensions and renewals thereof, together with all other rights and remedies and demands which the indemnitor has or may have in the premises, all of which rights and remedies and demands the indemnitor hereby assigns to the Surety, with full power and authority to said Surety, in the name of the indemnitor, or otherwise, as it may be advised, and as attorney for such indemnitor, to do anything, which the indemnitor might do, if personally present, if this instrument were not executed, and the indemnitor hereby appoints said Surety its attorney for such purpose.

IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication by reason of such

suretyship, shall be *prima facie* evidence of the fact and of the extent of the indemnitor's liability therefor to the surety. [9]

X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship.

XI. That this agreement shall not, nor shall acceptance by the Surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, nor assent by it to any act of the principal named in the suretyship obligations, or of any persons acting on behalf of the principal or of the indemnitor, in any way abridge, defer or limit its right to be subrogated to any right or remedy, nor limit or abridge any right or remedy which the Surety otherwise might or may have, acquire, exercise or enforce, nor create any liability on the part of the Surety which would not exist were this agreement not executed.

XII. That any person making appraisals or

valuations of property, or examinations of titles to property, or otherwise advising concerning the same, shall, whether nominated by the Surety, the principal, the indemnitor, or any other person, be deemed to be the agent of the principal and of the indemnitor and not of the Surety, notwithstanding that the person so acting may be an employee or other representative of the Surety Company.

XIII. That the liability of the indemnitor hereunder shall not in any wise be limited or discharged by any alteration, renewal, extension or modification of the suretyship which shall have been requested or assented to by the principal in said obligation named and by the Surety; but, on the contrary, all the terms of this agreement shall apply to any and all such alterations, renewals, extensions and modifications.

XIV. That upon notice to, or discovery by, the Surety of the failure of the indemnitor to comply with any provision of the contract above mentioned, the Surety may immediately take possession of such plant and materials as the indemnitor may own or have upon, or adjacent to, or intended to be used upon said work, so that the Surety may use the same in the prosecution of such contract, and right to possession of such plant and materials shall not be considered as waived by any delay on the part of said Surety to exercise said right. In the event of the principal named in said bond being declared in default by the obligee therein named, the Surety shall have the right to collect and receive all reserve percentages and all moneys due and to become due such

principal under said contract, and to hold and apply the same as collateral to this agreement.

XV. That the indemnitor has pledged with said Surety, as collateral security hereto and for all claims of said Surety against the indemnitor:

—and hereby agrees to keep on deposit at all times until complete performance of this agreement, and the expiration, without appeal or proceedings to review, of the time to appeal from or review, any adjudication or determination directly or indirectly fixing or discharging such liability, securities acceptable to the Surety of the value of \$—— with authority to the Surety, on nonperformance [10] of any part of this agreement or any other contract between the parties hereto, without notice of amount claimed and without demand, in case said collateral is cash, to pay therefrom any sum which the indemnitor may become liable to pay the Surety by reason of any contract between the parties hereto; in case such security is the obligation of any person at its election to sell the same at public or private sale or to collect the same, by action or otherwise, and apply the proceeds thereof to the payment of any sums which may become due under any contract between the parties hereto; and in case such security consists of stocks, bonds, or other similar securities, to sell the whole or any part thereof or any substitutes therefor, or any additions thereto, without notice, at any broker's board, or at public or private sale, and to apply the proceeds thereof to the payment of any sum which may be due under any contract between the parties hereto; and upon any sale at auction or

broker's board by virtue of this agreement the Surety may purchase the whole or any part of said property, discharged from any right of redemption, which is expressly released to said Surety.

Signed and sealed June 2d, 1910.

(Signed) WELLS CONST. CO.

" By JOE WELLS.

" JOE WELLS. (Seal)

Signed, sealed and delivered in the presence of:

(Signed) F. B. LEWIS.

ACKNOWLEDGE SIGNATURES ON THIS  
PAGE.

Province British Columbia,

City of Vancouver,—ss.

On the second day of June, 1910, before me personally appeared Joe Wells to me known and known to me to be the person described in and who executed the foregoing instrument, and he thereupon acknowledged to me that he executed the same.

[Seal] (Signed) F. B. LEWIS.

Province of British Columbia,

City of Vancouver,—ss.

On the second day of June in the year 1910 before me personally came Joe Wells to me known, who being by me duly sworn, did depose and say: that he resided in Tacoma and that he is the Secretary of the Wells Construction Company the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of



directors of said corporation, and that he signed his name thereto by like order.

(Signed) B. F. LEWIS. (Seal) [11]

Par. VI.

But for the want of indemnitators said application was returned and thereafter, on or about and between the 15th and 20th day of June, 1910, a further application, as next hereinafter set forth, was made, signed and subscribed on the 15th day of June, 1910, at Vancouver in British Columbia, by Geo. E. Vergowe and A. H. Cederberg respectively, and on the 16th day of June, 1910, at the same place, by Joe Wells, and on the 20th day of June, at the City of Tacoma, in the State of Washington by Simon Mettler and Peter Sandberg, one of the defendants herein, and that said Peter Sandberg then and there signed and subscribed the same in order to enable the said Wells Construction Company to take and obtain, as it did in pursuance thereof take and obtain, construction contracts in which said Peter Sandberg was interested, and that said further application was in words and figures as follows, to wit:

Form C.

F. Reamended. 16M 9'09.

State—Vancouver, B. C.

Agency—F. B. Lewis.

AMERICAN SURETY COMPANY

of New York.

A. No. 82

(Eighty-two)

Capital and Surplus, \$5,500,000.

Bond No. 797682.

APPLICATION FOR CONTRACT OR BID  
BOND.

Amount—\$25,000.00

NOTE—These should accompany this application :

1. Financial Statement, Form C 413 with schedules.
2. Copy of Contract, or in case of a bid, of advertisement, instructions and bid showing date and signature.

(Copy contract to follow.)

3. Copy of specifications, and of every contract, franchise or other document referred to in, made part of or governing the contract or bid. Plans as a rule not necessary.

Company's Office  
Building,

100 Broadway, N. Y.

Premium \$875.00

Vancouver, B. C.

Place and date (Place)

of this June 2d, 1910.

Application. (Date)

To American Surety Company of New York:

Application is hereby made for a bond of suretyship, as follows:

1. Name, age, business address and residence.

(In the case of a partnership, add name and residence of each partner; in the case of a corporation add names and residences of the four principal officers, and state date of organization or incorporation, name principal holders of stock and bonds, if any.)

Wells Construction Company, a Company registered in B. C. of Tacoma, Washington, U. S. A. Jos. Wells, Manager & Secy., Simon Mettler, President, Geo. E. Vergowe, Vice-President. [12]

2. Name and address of obligee Powell River Paper Company of Vancouver, B. C. (If an agent, officer or board, give full description as per contract, specifications and bond.)
3. Place and date of bid opening, if any: ———.
4. Contract for Construction of dam and canal on Powell River, B. C.
5. Contract dated June 2d, 1910.
6. Contract price, approximate: \$175,000.
7. Time for completion October 31st, 1910.
8. Penalty for delay: Not stated.
9. Grounds for extension of time: ———.
10. Terms of payment, reserved percentage 85% monthly; 15% Reserve.
11. Does contract cover patent indemnity?
12. Terms and duration of guarantee of efficiency, maintenance and repairs, if any, in contract or specifications: None.
13. Date of bond; June 24th, 1910.
14. Amount of Bond: \$25,000.

- 20 *American Surety Company of New York*
15. If a bid bond, will it operate as a contract bond?
  16. If a bid bond, not to operate as a contract bond, amount of contract bond will be, \$——, if not specified, then the amount in which surety on contract bond must justify will be, \$——.
  17. Limit on time for suit: January 31st, 1911.
  18. Name, title and address of architect or engineer in charge: N. O. Hardy.
  19. If you bid for the contract, give other bids including highest and lowest: No others.
  20. State nature of business, and if carried on in other States, territories or countries, specify the same: ——. General Contractors, Vancouver, B. C. Tacoma, Washington.
  21. State number years previous experience as contractor: 10 years.
  22. What other contracts have you on hand? State contract price in each case and percentage of work completed:
    - Paving Contract in Tacoma, \$130,000, 70% completed.
    - Storm Sewer Contract in Tacoma, 24,612 80% completed, done in 40 days.
    - 8 story building in Tacoma, 45,000, 95% completed to be completed 15 June.
    - Metropolitan Building in Vancouver, 57,000, 5% completed.
    - Pacific Development Co. excavation, 12,000, 25% completed.
    - Not taking any more work in Tacoma.
  23. What arrangements have you made for supplies, materials, subcontracts, etc., in connection

with the work provided for in [13] said contract? Owner to furnish all materials, not subcontracting.

24. Do you carry life insurance? Name companies and amounts: ———.
- Yes, all the principal officers carry from \$5,000 to \$35,000.
25. Do you carry employers' liability insurance? Name companies and amounts: Yes.
26. If you bid for the contract did you give a proposal bond? If so, state amount and names and residences of your sureties: No.
27. Have you ever applied to any other source for a bond for this contract? If so, state when, and to whom, and with what result: No.
28. Have you furnished bonds before? Give names of your sureties. What bonds are now outstanding? Yes, principally by the Title Guarantee & Surety Co. of Scranton, Pa. \$164,000 Bonds outstanding in Tacoma.
29. Are you engaged or interested in any other line of business? If so, state its nature, location, firm name, names of partners, etc: No.
30. Have you, or if a firm or corporation, has said firm or corporation, or any firm or corporation or individual to which it is a successor, or any member of said firm, ever compromised with its or his creditors, or become bankrupt or in any other way become discharged from its or his debts otherwise than by payment thereof in full? If so, state details thereof, in full, in confidential letter to be annexed: No.

22 *American Surety Company of New York*

31. References. (Bankers, merchants, supply houses and others with whom you have had contracts, preferred.)

Name.	Occupation.	Address.
Peter Sandberg	Capitalist.	Tacoma Wash.
John W. Link	” ex-Mayor	Tacoma
Pacific National Bank		”
Stebbins, Walker	Spinning,	·
wholesale material men		”
Tacoma Trading Co.		”

Should the AMERICAN SURETY COMPANY OF NEW YORK, hereinafter called the Surety, execute or procure the execution of the suretyship hereinbefore applied for, or other suretyship in lieu thereof, the undersigned, hereinafter called the Indemnitor, do hereby in consideration thereof, jointly and severally undertake and agree :

I. That the statements contained in the foregoing application are true.

II. That the indemnitor will immediately pay the Surety at its office, 100 Broadway, New York City, \$875.00 on the 2d day of June in each year hereinafter and until the indemnitor shall serve upon the Surety competent, written, legal evidence of its final discharge from such suretyship, and [14] all liability by reason thereof, and any and all renewals and extensions of the same, and the expiration, without appeal or proceedings to review, of the time to appeal from or review any adjudication or determination directly or indirectly fixing or discharging such liability.

III. That in the event of said Surety executing or procuring the execution by sureties of the contract bond or bonds, required to be given if said contract or contracts be awarded to the applicant, or if said bond or bonds now applied for shall operate as such contract bond or bonds, or in the event of a contract being awarded and no contract bond required, the indemnitor will pay it, said Surety ——— per cent of the amount of such contract, award or orders annually in advance (no premium to be less than Ten Dollars, however); and the indemnitor does also agree that all the terms and conditions of this agreement shall cover and apply to the contract bond or bonds so executed.

IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship and any and all renewals and extensions thereof, and before it shall be required to pay the same.

V. That upon the making of any demand, or the giving of any notice, or the institution of any proceeding preliminary to determining or fixing any liability

which the Surety may be called upon to discharge by reason of such suretyship, and any and all renewals and extensions thereof, the indemnitor will immediately notify the Surety thereof in writing at its said office.

VI. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety, to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety's intent so to do, or on making such request, place the Surety in possession of funds or securities, approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding from the State Court to the Federal Court, in any State where such action would in any way effect the Surety's license or right to transact business.

VII. That the indemnitor will, upon the request of the Surety, procure the discharge of the Surety from said suretyship, and all liability by reason thereof, and any and all renewals and extensions thereof.

VIII. That the Surety shall, at its option, have and may exercise, in the name of the indemnitor, or otherwise, any right, or remedy, or demand which the indemnitor may have for the recovery of any sums paid by the Surety by virtue of its suretyship, and any



and all extensions [15] and renewals thereof, together with all other rights and remedies and demands, which the indemnitor has or may have in the premises, all of which rights and remedies and demands the indemnitor hereby assigns to the Surety, with full power and authority to said Surety, in the name of the indemnitor, or otherwise, as it may be advised, and as attorney for such indemnitor, to do anything, which the indemnitor might do, if personally present, if this instrument were not executed, and the indemnitor hereby appoints said Surety as its attorney for such purpose.

IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication by reason of such suretyship, shall be *prima facie* evidence of the fact and of the extent of the indemnitor's liability therefor to the Surety.

X. That the Surety also looks to and relies upon the property of the indemnitor and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and

earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship.

XI. That this agreement shall not, nor shall acceptance by the Surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, nor assent by it to any act of the principal named in the suretyship obligation, or of any person acting on behalf of the principal, or of the indemnitor, in any way abridge, defer or limit its right to be subrogated to any right or remedy, nor limit or abridge any right or remedy which the Surety otherwise might or may have, acquire, exercise or enforce, nor create any liability on the part of the Surety which would not exist were this agreement not executed.

XII. That any person making appraisals or valuations of property, or examinations of title to property, or otherwise advising concerning the same, shall, whether nominated by the Surety, the principal, the indemnitor, or any other person, be deemed to be the agent of the principal and of the indemnitor and not of the Surety, notwithstanding that the person so acting may be an employee or other representative of the Surety Company.

XIII. That the liability of the indemnitor hereunder shall not in any wise be limited or discharged by any alteration, renewal, extension or modification of the suretyship which shall have been requested or assented to by the principal in said obligation named and by the Surety; but, on the contrary, all the terms of this agreement shall apply to any and all such al-

terations, renewals, extensions and modifications.

XIV. That upon notice, or discovery by, the Surety of the failure of the indemnitor to comply with any provision of the contract above mentioned, the Surety may immediately take possession of such plant and materials as the indemnitor may own or have upon, or adjacent [16] to, or intended to be used upon said work, so that the Surety may use the same in the prosecution of such contract, and right to possession of such plant and materials shall not be considered as waived by any delay on the part of said Surety to exercise said right. In the event of the principal named in said bond being declared in default by the obligee therein named, the Surety shall have the right to collect and receive all reserve percentages and all moneys due and to become due such principal under said contract, and to hold and apply the same as collateral to this agreement.

XV. That the indemnitor has pledged with said Surety, as collateral security hereto and for all claims of said Surety against the indemnitor: and hereby agrees to keep on deposit at all times until complete performance of this agreement, and the expiration, without appeal or proceedings to review, of the time to appeal from or review, any adjudication or determination directly or indirectly fixing or discharging such liability, securities acceptable to the Surety of the value of \$—— with authority to the Surety, on nonperformance of any part of this agreement or any other contract between the parties hereto, without notice of amount claimed and without demand, in case

said collateral is cash, to pay therefrom any sum which the indemnitor may become liable to pay the Surety by reason of any contract between the parties hereto; in case such security is the obligation of any person, at its election to sell the same at public or private sale or to collect the same, by action or otherwise, and apply the proceeds thereof to the payment of any sums which may become due under any contract between the parties hereto; and in case such security consists of stocks, bonds, or other similar securities, to sell the whole or any part thereof, or any substitutes therefore, or any additions thereto, without notice, at any broker's board, or at public or private sale, and to apply the proceeds thereof to the payment of any sum which may be due under any contract between the parties hereto; and upon any sale at auction or broker's board by virtue of this agreement the Surety may purchase the whole or any part of said property, discharged from any right of redemption, which is expressly released to said Surety.

Signed and sealed June 15th, 1910.

WELLS CONSTRUCTION CO. (Seal)

(Signed) Per A. H. CEDERBERG,

Chief Engineer.

" SIMON METTLER. (Seal)

" GEO. E. VERGOWE. (Seal)

" PETER SANDBERG. (Seal)

" JOE WELLS. (Seal)

Signed, sealed and delivered in the presence of:

F. B. LEWIS,

As to Wells Construction Co.

GEO. E. VERGOUE,

JOE WELLS,

ACKNOWLEDGE SIGNATURES ON THIS  
PAGE.

Province of British Columbia,  
City of Vancouver,—ss.

On the fifteenth day of June, 1910, before me personally appeared George E. Vergowe to me known and known to me to be the person described in and who executed the foregoing instrument, and he thereupon acknowledged to me that he executed the same.

[Seal]

F. B. LEWIS,

Notary Public. [17]

Province of British Columbia,  
City of Vancouver,—ss.

On the fifteenth day of June, in the year 1910, before me personally came A. H. Cederberg to me known, who being by me duly sworn, did depose and say: that he resided in Vancouver, B. C., that he is the Chief Engineer of the Wells Construction Company the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that

he signed his name thereto by like order.

[Seal]

(Signed) F. B. LEWIS.

FOR MAKER OF A DEED.

797682.

I HEREBY CERTIFY that Joseph Wells personally known to me, appeared before me and, acknowledged to me that he is the person mentioned in the annexed instrument as maker thereof, and whose name is subscribed thereto as party thereto that he knows the contents thereof, and that he executed the same voluntarily, and that he is of the full age of twenty-one years.

In Testimony whereof I have hereunto set my Hand and Seal of Office, at Vancouver, B. C., this sixteenth day of June, in the year of Our Lord one thousand nine hundred and ten.

[Seal]

(Signed) F. B. LEWIS,

A Notary Public in and for the Province of British Columbia.

797682.

I HEREBY CERTIFY that Simon Mettler personally known to me, appeared before me and, acknowledged to me that he is the person mentioned in the annexed instrument as maker thereof, and whose name is subscribed thereto as party thereto that he knows the contents thereof, and that he executed the same voluntarily, and that he is of the full age of twenty-one years.

In Testimony whereof I have hereunto set my Hand and Seal of Office, at Tacoma, this 20th day of

June, in the year of Our Lord one thousand nine hundred and —.

[Seal] (Signed) JAMES E. BURKEY,  
A Notary Public in and for the State of Wash-  
ton.

797682.

I HEREBY CERTIFY that Peter Sandberg personally known to me, appeared before me and, acknowledged to me that he is the person mentioned in the annexed instrument as maker thereof, and whose name is subscribed thereto as party thereto that he knows the contents thereof, and that he executed the same voluntarily, and that he is of the full age of twenty-one years.

In Testimony whereof I have hereunto set my Hand and Seal of Office at Tacoma, this twentieth day of June, in the year of Our Lord one thousand nine hundred and ten.

[Seal] (Signed) JAMES E. BURKEY,  
A Notary Public in and for the State of Wash-  
ton. [18]

Par. VII.

That on the 24th day of June, 1910, and in pursuance of said application and contract of indemnity of Peter Sandberg as aforesaid, the plaintiff made, executed and delivered its standard form of contract bond with Wells Construction Company as principal and itself as surety to Powell River Paper Company, Limited, of Vancouver, B. C., in the penal sum of twenty-five thousand dollars (\$25,000), conditioned, among other things, that if Wells Construction Company should indemnify the Powell

River Paper Company, Limited, against any loss or damage directly arising by reason of the failure of the Wells Construction Company to faithfully perform the said contract of the 2d day of June, 1910, for the construction of the aforesaid dam and the aforesaid canal on Powell River in British Columbia, then the bond should be void, otherwise to remain in full force and effect; that thereafter, and with the consent of Wells Construction Company and with its signature to the stipulation, it was stipulated in reference to said bond that the limitation date of suit or action to be brought thereon for damages, if any occurring, should be the 30th day of April, 1911, instead of the 31st day of January, 1911, as first in said bond set forth among the other conditions of said bond not now presently material hereto.

Par. VIII.

That on the 27th day of April, 1911, and within the time prescribed in said bond and for failure to perform the contract of June 2, 1910, Powell River Paper Company, Limited, in the Supreme Court of British Columbia, issued its writ and brought a suit against Wells Construction Company and American Surety Company of New York, the plaintiff herein, claiming and demanding under said contract of June 2, 1910, sundry and various large sums of money. [19]

Par. IX.

That on the 17th day of May, 1911, there was served upon the defendant Peter Sandberg at his then residence, being No. 1128½ Pacific Avenue, in



the city of Tacoma, Washington, a notice of said suit or action so brought by Powell River Paper Company, Limited, against Wells Construction Company and this plaintiff, setting forth the writ and giving the particulars of said suit of action and notifying and requiring the said Peter Sandberg to appear and defend said suit in behalf of American Surety Company of New York, the plaintiff herein, and further notifying him, the said Peter Sandberg, that in the event he did not do so that he would be bound by the judgment rendered in said cause, but that the said Peter Sandberg did not comply with said notice or defend said suit or take any action or proceedings therein for and on behalf of this plaintiff or in defense of any part of said suit.

Par. X.

That thereafter such proceedings were had in said Supreme Court of British Columbia that on Monday, the 5th day of May, 1913, there was rendered and given, and thereafter entered on the 20th day of September, 1913, a judgment in said cause against Wells Construction Company and American Surety Company of New York for thirty-one thousand six hundred *thirty and 94/100* dollars (\$31,632.94) and the penalty of said bond forfeited against said American Surety Company of New York and the said plaintiff herein was compelled to pay the whole and every part of said judgment, but the said defendant Peter Sandberg has not indemnified the plaintiff as in his aforesaid agreement of indemnity set forth nor repaid any part of the same to this plaintiff, although the said Peter Sandberg knew

and was notified thereof and demand made upon him so to do. [20]

Par. XI.

That the said Peter Sandberg has not kept and performed said agreement of indemnity or done or performed any of the things required in and by the terms of the application and indemnity agreement signed and executed by him as in paragraph VI hereinbefore set forth or any part thereof; and that neither the Wells Construction Company nor Simon Mettler nor Geo. E. Vergowe nor Joe Wells nor any of them have paid or caused to be paid or indemnified or reimbursed this plaintiff against the amount of said judgment and the losses accruing upon said contract and bond or any part of the same.

Par. XII.

That in and by paragraph IX in said application and indemnity agreement hereinbefore referred to and in paragraph VI hereof described, it is, among other and various things, provided that the order, judgment or adjudication by reason of such suretyship shall be *prima facie* evidence of the fact and of the extent of the indemnitor's liability thereof to the surety, and in addition thereto in clause X thereof and as a stipulated condition for the execution of said bond, it was agreed and covenanted that the surety looked to and relied upon the property of the said Peter Sandberg and the income and earnings thereof, either present or future, for anything due or to become due the surety under said agreement and that the suretyship was entered into for the special benefit of the said Peter Sandberg and the special benefit and

protection of Peter Sandberg's property, its income and earnings, he being substantially and beneficially interested in the award and performance of said contract and of the obtaining said suretyship and to both said clauses IX and X said Peter Sandberg agreed in addition to the other clauses in said agreement.

[21]

Par. XIII.

That the defendant Peter Sandberg contracted with the plaintiff in the manner aforesaid in the prosecution of the community estate, business and enterprise in such manner that the community would and did obtain the benefit of the continuance of the business of the Wells Construction Company and of contracts entered into between it and Powell River Paper Company, Limited, on or about the 2d day of June, 1910, for the construction of a dam and canal on Powell River in British Columbia and participation in profits derived from its operations in the Province of British Columbia and would and did further obtain the postponement of payment and discharge of indebtedness of Peter Sandberg and said community, estate and business from liability thereon to said Wells Construction Company.

Par. XIV.

That in and by said agreement of indemnity it is and was, among other and various things, also provided that all expenses, costs and charges to which said American Surety Company of New York should be put in and about the giving of said bond or the defense of any proceedings thereon should be paid and reimbursed to it by the said indemnitor, and that in

and about the maintenance of said suit and action of the said Powell River Paper Company, Limited, against said Wells Construction Company in said Supreme Court of British Columbia there was reasonably and fairly laid out and expended and incurred in and about said proceedings in said Court, in addition to the amount of said bond, the sum of fourteen hundred forty-nine and 85/100 dollars (\$1449.85), which the said Peter Sandberg in the aforesaid agreement of indemnity promised and agreed to repay, but that he has not done so nor has any part thereof been repaid.

WHEREFORE, American Surety Company of New York prays judgment against Peter Sandberg and Mathilda Sandberg, his wife, to [22] the extent of her interest whatever it may be, for the sum of twenty-five thousand dollars (\$25,000), with interest thereon from the 17th day of May, 1911, at six per cent. (6%) until paid, and for the further sum of fourteen hundred forty-nine and 85/100 dollars (\$1449.85) with interest thereon at the rate of six per cent. (6%) from the 22d day of September (1913, until paid, being an aggregate of twenty-six thousand four hundred forty-nine and 85/100 dollars (\$26,449.85) with interest on the main portions of said amounts from the respective dates above stated, together with costs and disbursements of this proceeding.

ELLIS LEWIS GARRETSON,  
H. B. LAMONTE,  
WM. C. BRISTOL,

Attorneys for American Surety Company of New  
York. [23]

**Answer.**

Come now defendants, and make the following answer to plaintiff's complaint herein.

I.

Answering paragraph VI, defendants admit that defendant Peter Sandberg signed and subscribed the application for a contract bond, a copy of which application is set forth in said paragraph, but these defendants deny that he signed and subscribed said application in order to enable said Wells Construction Company to take and obtain construction contracts in which said Peter Sandberg was interested.

These defendants further allege that defendant Peter Sandberg signed said application for the sole use, benefit and accommodation of the said Wells Construction Co., and not for the use, benefit or profit of himself or his codefendant Mathilda Sandberg, nor of the community consisting of said defendants, nor for the aid, use and benefit of any purpose in which said defendants, or either of them, or the community consisting of said defendants was interested in any way whatsoever.

II.

Answering paragraph VII of said complaint defendants admit plaintiff executed the bond therein referred to, but deny each and every other allegation therein contained.

III.

Defendants have no knowledge regarding the allegations contained in paragraph X of said complaint, and therefore deny each and every of said allegations,

except that defendant Peter Sandberg has made no payments whatever to plaintiff, on account of said indemnity agreement. [24]

## IV.

These defendants deny each and every allegation contained in paragraph XI of said complaint.

## V.

Answering paragraph XII of said complaint defendants deny that defendant Peter Sandberg was substantially, beneficially or in any other way interested in the award and performance of said contract, or in obtaining said suretyship, and deny that said suretyship was entered into by said Peter Sandberg for his special benefit, or for the benefit and protection of his property, its income or earnings.

Defendants allege, as heretofore done, that said application and indemnity agreement was signed by defendant Peter Sandberg for the sole use, benefit, profit and accommodation of said Wells Construction Company, and not for the use, benefit or profit of either of these defendants, nor of the community consisting of them.

## VI.

Answering paragraph XIII these defendants deny that defendant Peter Sandberg contracted with plaintiff in the manner set forth in the previous paragraphs in the prosecution of the community estate, business and enterprise, and in such a manner that the community would, and did, obtain the benefit of the continuance of the business of the Wells Construction Company, and of contracts entered into between it, and the Powell River Paper Company

Ltd., on or about the 2d day of June, 1910, for the construction of a dam and canal on Powell River in British Columbia, and deny that said defendants, or either of them, or the community consisting of them, were in *any whatsoever* interested in the participation of the profits derived from the operations of said [25] Wells Construction Company in the Province of British Columbia, and deny that defendant Peter Sanberg entered into said contract with the plaintiff under any understanding or agreement, express or implied, that he would thereby and did obtain the postponement of payment and discharge of any indebtedness whatever of himself, of said community estate and business from liability thereunder to said Wells Construction Company.

Defendants further allege that the execution of said indemnity agreement by said defendant Peter Sandberg was without the least consideration of any kind, character or description, past, present or future, either to himself or his codefendant, or to the community consisting of them both, but as above alleged he signed the same as surety for the sole use, benefit, profit and accommodation of said Wells Construction Company, and not for the use, benefit, or profit of himself, or his codefendant, nor of the community consisting of them both.

#### VII.

Answering paragraph XIV defendants allege that they have not knowledge or information regarding the allegations therein contained, and therefore deny each and every thereof, except they admit that defendant Peter Sandberg has not paid to plaintiff any

portion of the part therein stated.

SECOND.

Further answering said complaint, and by way of a showing for affirmative relief herein, these defendants allege:

I.

That defendants are, and since November 30, 1894, have been, husband and wife.

II.

That defendants are the owners of community real [26] property in the counties of Pierce and King, in the State of Washington, as follows:

Lots 13 and 14, in Block 1104; Lots 10, 11 and 12, in Block 1403; Lots 7 and 8 in Block 1101, and Lots 11 and 12, in Block 1303; in the city of Tacoma, as the same are designated upon a certain map entitled "Map of New Tacoma, Washington Territory," which map was filed for record in the office of the County Auditor of said County, February 3d, 1875.

Also the following described tract:

Beginning at the intersection of the North line of Lower Eleventh Street South with the East line of the City Waterway, as shown on the Supplemental Plat of Tacoma Tide Lands; thence Easterly along the North line of Lower 11th Street 393.206 feet; thence Northerly along a line making an angle of 73 degrees, 50 minutes 02 seconds with the last described course of 184.181 feet; thence Westerly along a line at right angles to the line last described 356.033 feet to the Eastern line of City Waterway 77.77 feet to the point of beginning. Also commencing at the intersection of the North line of Lower South 11th Street



with the East line of City Waterway above described; thence Easterly along the North line of Lower South 11th Street 476.499 feet, to the place of beginning of the tract herein described; thence Northerly along a line making an angle of 73 degrees 50 minutes 02 seconds with the last described course 173.510 feet; thence Southerly along a line at right angles to the last described course 302.416 feet to the North line of Lower South 11th Street; thence Westerly along said North line of Lower South 11th Street 175.133 feet to the place of beginning.

Lots 1, 2, 3 and 4, Block 1112 Tacoma Land Company's Addition;

Lots 11 and 12, Block 7638, Tacoma Land Company's Seventh Addition;

Lot 1, Block 61, Balch's Addition to Steilacoom, Pierce County, Washington;

West  $\frac{1}{2}$  of S. E.  $\frac{1}{2}$ , less  $1 \frac{38}{100}$  acres, and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  Section 8, Township 8, Range 5 East, Pierce County;

West half of Section 2, Township 20, Range 7, King County, Washington;

North  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  of Section 12, Township 20, Range 7, and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , Section 12, Township 20, Range 7, King County, Washington.

Southwest quarter of Section 6, Township 20, Range 8, King County, Washington;

East  $\frac{1}{2}$  of Southeast  $\frac{1}{4}$ , Section 10, Township 20, Range 8, King County, Washington;

All of which said property was acquired after the marriage of [27] defendants, and by their joint

efforts, and the same is the community property of defendants.

### III.

That the indemnity agreement referred to in paragraph VI of plaintiff's complaint was executed by defendant Peter Sandberg as a surety, for the sole use, profit and accommodation of a third person, to wit, Wells Construction Company, as set forth in paragraph I of this answer, and was not executed for the use, benefit or profit of defendants, or either of them, nor the community consisting of defendants, and any obligation incurred thereby by the said defendant Peter Sandberg, is not a debt or obligation of the community consisting of these defendants.

Defendants further allege that if a judgment is rendered thereon against these defendants jointly, or against said defendant Peter Sandberg individually, it will be a cloud upon the title to the community real property of these defendants hereinbefore set forth.

WHEREFORE, defendants pray that said action be dismissed, and that they be allowed their costs herein.

Further, defendants pray that if any judgment be rendered herein against defendant Peter Sandberg that the same be adjudged and decreed to be a judgment against him individually, and that the same is not a debt or obligation of the community of these defendants, and that it is not, and does not constitute a lien upon the community real property of defendants, and that the real property hereinbefore set forth be adjudged to be the community property of defend-

ants free and clear of any judgment that may be entered herein.

BATES, PEER & PETERSON,  
Attorneys for Defendants,  
1107 Nat'l Realty Bldg.,  
Tacoma, Washington. [28]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 26, 1914.  
Frank L. Crosby, Clerk. By E. C. Ellington, Deputy.  
[29]

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**Motion of Plaintiff to Strike Out Parts of Answer.**

The plaintiff, through its attorneys, moves the Court to consider of the answer herein as served on the 3d day of October, 1914, and grant an order striking out and expunging therefrom the following matter upon the following specific grounds:

I.

All of the matter in paragraph "I" of said answer commencing on line 24, page 1 of said answer, with the words "These defendants further allege," down to the end of line 2 on page 2 of said answer, in paragraph "I" thereof, ending with the words "in any way whatsoever," for the reason and upon the ground that the same is not responsive and material and is irrelevant and redundant and a legal conclusion and said matter does not present any issuable fact in connection with the paragraph of the complaint to which said matter in said answer is purported to be directed and said matter involves, if anything at all, a legal and ultimate question to be determined by this Court as matter of law, not as matter of fact.

## II.

All of the matter contained in paragraph "IV" of said answer, lines 15 to 16, for the reason that said denial is frivolous and sham and because it is inconsistent with the admissions otherwise made in said answer.

## III.

All of paragraph "V" of said answer, consisting of the matter on lines 18 to 30 on page 2 thereof, for the reason and upon the ground that the same is frivolous, and for the further reason that a party in pleading will not be permitted to deny the terms of his written contract, and for the further reason that said matter is not [30] a confession and avoidance of the contract signed by the said Peter Sandberg with the plaintiff, which the said Peter Sandberg otherwise in his said answer admits, and for the further reason that the same is a legal conclusion and involves the ultimate judgment to be passed by this Court as matter of law.

## IV.

All of the matter commencing with the words "Defendants further allege," in line 22 of page 3 of said answer, paragraph "VI" thereof, down to and inclusive of the words "consisting of them both," on page 4 of said answer, for the reason that the same is a legal conclusion and not the statement of any fact, and for the further reason that a party is not permitted in pleading to deny his own contract without confessing and avoiding the same, and for the further reason that said matters present the legal questions to be adjudicated by this Court herein and do

not present issuable matters of fact tendering any issue herein.

V.

All of the matter contained in paragraph "III" of the affirmative matter contained in said answer on page 5 thereof, commencing at line 23 with the words "That the indemnity agreement," down to and inclusive of the words "hereinbefore set forth," in line 6 of page 6 of said answer, upon the ground that the same and the whole thereof is legal conclusion not matter of fact and tenders no issuable fact for trial herein but involves the ultimate determination and adjudication of this Court in said cause and is irrelevant and redundant matter.

This motion is based upon the complaint and answer filed herein and the other records, papers and files in the clerk's office in the federal courthouse at Tacoma, in this case. [31]

E. L. GARRETSON,  
W. C. BRISTOL,  
Attorneys for Plaintiff.

Filed in the U. S. District Court Western Dist. of Washington, Southern Division. Oct. 9, 1914.  
Frank L. Crosby, Clerk. By E. C. Ellington, Deputy.  
[32]

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**Order Granting Motion to Strike Parts of Answer.**

This cause coming on for hearing upon the plaintiff's motion to strike out parts of defendants' answer; plaintiff being represented by its attorneys, W. C. Bristol and Ellis Lewis Garretson, defendants being represented by their attorneys, Bates, Peer &

Peterson, argument of respective counsel having been made, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED and ADJUDGED that paragraph II of said motion be, and the same is hereby granted, and paragraph IV of defendants' said answer is hereby stricken, and said answer with paragraph IV thereof thus stricken may stand as the amended answer herein.

That all of the remaining parts of said motion are hereby overruled, and denied, to which ruling plaintiff excepts, and its exception is hereby allowed.

Signed in open court this 29th day of October, A. D. 1914.

EDWARD E. CUSHMAN,  
Judge.

Filed in the U. S. District Court, Western District of Washington, Southern Division. Oct. 29, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [33]

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### **Reply to Defendants' Answer.**

Plaintiff, through its attorneys, reserving all manner of objection and exception that might arise to it upon its motion against the answer of the defendants herein, for reply to said answer as the same now stands:

Par. I.

Denies that the defendants or either of them, composing the community estate of Peter Sandberg and wife, were not interested in the making of the ap-

plication referred to in said answer; and denies that defendant Peter Sandberg signed said application for the sole use or benefit or accommodation of the said Wells Construction Company; and denies that Peter Sandberg did not sign the same for the use, benefit and profit of himself and his codefendant Mathilda Sandberg; and denies that Peter Sandberg did not sign said application for the use, benefit and profit of the community consisting of said defendants; and denies that said Peter Sandberg did not sign said application for the aid or use or benefit or any purpose of said defendants or either or both of them; and denies that Peter Sandberg did not sign said application for the use, benefit or profit of the community consisting of said defendants; and denies that the community consisting of said defendants was not interested in any way whatsoever therein or in the giving of said bond or of the matters and things that grew out thereof; and denies each and every matter and thing affirmatively set forth in paragraph I of said answer.

Par. II.

Denies that said application and indemnity agreement was signed by Peter Sandberg for the sole use, benefit, profit or accommodation of said Wells Construction Company; and denies that said application and indemnity agreement were not signed by the [34] defendant Peter Sandberg for the use, benefit and profit of both the defendants and of the community consisting of them; and denies all of the affirmative matter set forth and alleged in paragraph V of said answer.

Par. III.

Denies that the execution of said indemnity agreement by said defendant Peter Sandberg was without the least consideration of any kind, character or description or that it was without consideration past, present or future, either to himself or his co-defendant or to the community consisting of them both; and denies that Peter Sandberg signed said application and indemnity agreement as surety for the sole use, benefit, profit or accommodation of said Wells Construction Company; and denies that he did not sign the same for the use, benefit and profit of himself and his codefendant; and denies that he did not sign the same for the use, benefit or profit of the community consisting of them both; and denies each and every matter and thing affirmatively set forth in paragraph VI of said answer.

REPLY TO THE SECOND PART OF THE ANSWER OF DEFENDANTS AND REPLY TO THE ALLEGED SHOWING FOR AFFIRMATIVE RELIEF THEREIN.

Plaintiff, through its attorneys, reserving and not waiving the same objection and exception as hereinbefore reserved, and further replying to the second part of said answer and to the alleged showing for affirmative relief therein.

Par. I.

Admits that the defendants are and have been since the 30th day of November, 1894, husband and wife. [35]

Par. II.

Admits that the defendants are the owners of



community real property in the counties of Pierce and King in the State of Washington as set forth and described in said answer on pages 4 and 5, but as to whether or not all of said property was acquired after the 30th day of November, 1894, or by their joint efforts or that the same or all of the same is the community property of the defendants, this plaintiff has not sufficient knowledge or information with which to form a belief or knowledge sufficient to answer and therefore denies the same and calls for proof thereof; and this plaintiff denies that the property described in paragraph II of said answer is all of the community property of the defendants. Par. III.

Denies that the indemnity agreement referred to in paragraph VI of plaintiff's complaint was executed by defendant Peter Sandberg as a surety or for the sole use, profit or accommodation of a third person, to wit, Wells Construction Company; and denies that the same was not executed for the use and benefit and profit of defendants or both of them; and denies that the same was not executed for the use and profit and benefit of the community consisting of the defendants; and denies that any obligation incurred thereby and by the said defendant Peter Sandberg is not a debt or obligation of the community consisting of both the defendants; and denies that a judgment rendered against these defendants jointly or against the defendant Peter Sandberg individually would be a cloud upon the title of the community real property of the defendants in the answer set forth; and denies that the

rendition of a judgment alone in the State of Washington creates a lien or cloud or any other incumbrance upon title to real property, community or otherwise; and denies each and every matter and thing affirmatively set forth [36] in paragraph III of said affirmative answer.

AFFIRMATIVE REPLY CHARGING  
ESTOPPEL.

Plaintiff, through its attorneys, still reserving and not waiving its objection and exception aforesaid, and by way of further reply, sets forth and alleges: Par. I.

That the said Peter Sandberg and Mathilda Sandberg, his wife, the defendants above named, should not now be heard or allowed to allege or say that defendant Peter Sandberg signed the application set forth in the complaint for the sole use, benefit and accommodation of said Wells Construction Company and not for the use, benefit or profit of himself or his codefendant Mathilda Sandberg nor of the community consisting of said defendants nor for the aid, use or benefit of any purpose in which said defendants or either of them or of the community consisting of said defendants was interested in any way whatsoever, and are estopped from so asserting, charging or alleging, for that the whole of said matter is no defense in law and contrary to the law adjudicated and interpreted by the Supreme Court of the State of Washington from and inclusive of the case of Oregon Improvement Company v. Sagmeister in 4th Washington at page 710, down to and inclusive

of Bird v. Steele, in 74th Washington at page 68; and further for that the said Peter Sandberg entered into a written contract with the plaintiff that among other things provided:

“X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor’s property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and [37] performance of such contract and obtaining such suretyship.”

—and further for that the said Peter Sandberg, at the time he signed said agreement with this plaintiff to become surety for Wells Construction Company, and Mathilda Sandberg, his wife, were indebted to Wells Construction Company for work and labor performed by it upon community property belonging to both of them in the city of Tacoma, to the amount of said indebtedness and the particular property being in detail particularly within the possession of the defendants and not of this plaintiff and they, the said defendants, were then and are now possessed of all the facts in connection with the same and they

are not in the possession of this plaintiff; and further for that this plaintiff as surety relied upon the contract and representations of said Sandberg in said contract when it gave its said bond for Wells Construction Company and was thereby induced and procured by reason of the contract of indemnity entered into by said Sandberg admitted in the answer and set forth in the complaint to become surety for the said Wells Construction Company in the performance of its said contract with Powell River Paper Company, Ltd., as hereinbefore set forth in the complaint.

Par. II.

That plaintiff presents the aforesaid plea and the same plea to the affirmative matter set forth in paragraph V of the said answer of the defendants.

#### FURTHER AFFIRMATIVE REPLY CHARGING ESTOPPEL.

Plaintiff, through its attorneys, still reserving and not waiving its objection and exception aforesaid, and by way of further reply, sets forth and alleges:  
[38]

Par. I.

That the said Peter Sandberg and Mathilda Sandberg, his wife, the defendants above named, should not now be heard or allowed to allege or say that the execution of the said indemnity agreement by said defendant Peter Sandberg was without the least consideration of any kind, character or description, past, present or future, either to himself or to his co-defendant or to the community consisting of both of them, but as above alleged he signed the same as

surety for the sole use, benefit, profit and accommodation of said Wells Construction Company and not for the use, benefit or profit of himself or his co-defendant or of the community consisting of both of them, and are estopped from so asserting, charging or alleging, for that the whole of said matter is no defense in law and contrary to the law adjudicated and interpreted by the Supreme Court of the State of Washington from and inclusive of the case of Oregon Improvement Company v. Sagmeister in 4th Washington at page 710, down to and inclusive of Bird v. Steele, in 74th Washington at page 68; and further for that the said Peter Sandberg entered into a written contract with the plaintiff that among other things provided:

“X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor’s property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship.”

—and further for that the said Peter Sandberg, at

the time he signed said agreement with this plaintiff to become surety for Wells Construction Company, and Mathilda Sandberg, his wife, were indebted to Wells Construction Company for work and labor performed by it [39] upon community property belonging to both of them in the city of Tacoma, to the amount of said indebtedness and the particular property being in detail particularly within the possession of the defendants and not of this plaintiff and they, the said defendants, were then and are now possessed of all the facts in connection with the same and they are not in the possession of this plaintiff; and further for that this plaintiff as surety relied upon the contract and representations of said Sandberg in said contract when it gave its said bond for Wells Construction Company and was thereby induced and procured by reason of the contract of indemnity entered into by said Sandberg admitted in the answer and set forth in the complaint to become surety for the said Wells Construction Company in the performance of its said contract with Powell River Paper Company, Ltd., as hereinbefore set forth in the complaint.

Par. II.

That plaintiff presents the aforesaid plea and the same plea to the affirmative matter set forth in paragraph V of the said answer of the defendants.

#### FURTHER AFFIRMATIVE REPLY CHARGING ESTOPPEL.

Plaintiff, through its attorney, still reserving and not waiving its objection and exception aforesaid, and by way of further reply, sets forth and alleges:

Par. I.

That the said Peter Sandberg and Mathilda Sandberg, his wife, the defendants above named, should not now be heard or allowed to allege or say that the indemnity agreement referred to in paragraph VI of plaintiff's complaint was executed by defendant [40] Peter Sandberg as a surety, for the sole use, profit and accommodation of a third person, to wit, Wells Construction Company, as set forth in paragraph I of the answer, and was not executed for the use, benefit or profit of defendants, or either of them, nor the community consisting of defendants, or any obligation incurred thereby by the said defendant Peter Sandberg, is not a debt or obligation of the community consisting of these defendants, or that if a judgment is rendered thereon against these defendants jointly, or against said defendant Peter Sandberg individually, it will be a cloud upon the title to the community real property of these defendants hereinbefore set forth, and are estopped from so asserting, charging or alleging, for that the whole of said matter is no defense in law and contrary to the law adjudicated and interpreted by the Supreme Court of the State of Washington from and inclusive of the case of Oregon Improvement Company v. Sagmeister in 4th Washington at page 710, down to and inclusive of Bird v. Steele in 74th Washington at page 68; and further for that the said Peter Sandberg entered into a written contract with the plaintiff that among other things provided:

“X. That the Surety also looks to and relies upon the property of the indemnitor, and the

income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

—and further for that the said Peter Sandberg, at the time he signed said agreement with this plaintiff to become surety for Wells Construction Company, and Mathilda Sandberg, his wife, were indebted to Wells Construction Company for work and labor performed by it upon [41] community property belonging to both of them in the city of Tacoma, to the amount of said indebtedness and the particular property being in detail particularly within the possession of the defendants and not of this plaintiff and they, the said defendants, were then and are now possessed of all the facts in connection with the same and they are not in the possession of this plaintiff; and further for that this plaintiff as surety relied upon the contract and representations of said Sandberg in said contract when it gave its said bond for Wells Construction Company and was thereby induced and procured by reason of the contract of



indemnity entered into by said Sandberg admitted in the answer and set forth in the complaint to become surety for the said Wells Construction Company in the performance of its said contract with Powell River Paper Company, Ltd., as hereinbefore set forth in the complaint.

FURTHER AFFIRMATIVE REPLY CHARGING  
ESTOPPEL.

Plaintiff, through its attorneys, still reserving and not waiving its objection and exception aforesaid, and by way of further reply, sets forth and alleges:  
Par. I.

That the said Peter Sandberg and Mathilda Sandberg, his wife, the defendants above named, should not now be heard or allowed to allege or say any of the matters or things attempted now to be set forth by these defendants affirmatively in their said answer, that is to say, either, first, want of consideration, or second, suretyship only, or third, accommodation for Wells Construction Company only, or fourth, that the community interest is not bound or intended so to be, or fifth, that the acts of the said Sandberg in the particulars charged in the complaint were not for the use and benefit and in the interest of the community, for that on the [42] 27th day of May, 1911, the said Peter Sandberg was personally served at his residence and at the residence of Mathilda Sandberg, his codefendant, at No. 1128½ Pacific Avenue, in Tacoma, in Pierce County, in the State of Washington, with a copy of a notice addressed to Wells Construction Company, Simon

Mettler, George E. Vergowe, Peter Sandberg and Joe Wells, in words and figures as follows, to wit: "To the Wells Construction Company, Simon Mettler, George E. Vergone, Peter Sandberg and Joe Wells:

You, and each of you, are hereby notified that on June 2, 1910, you signed an application addressed to the American Surety Company of New York to execute a bond in the penal sum of Twenty-five Thousand Dollars, in favor of the Powell River Paper Company of Vancouver, British Columbia, to secure the performance on the part of the Wells Construction Company of a dam and canal on Powell River, British Columbia, and agreed in writing to indemnify said American Surety Company of New York for any loss thereunder.

You are further notified that on or about the 27th day of April, 1911, the Powell River Paper Company, Limited, the obligee in said bond, commenced an action by summons and writ in the Supreme Court of British Columbia, a copy of which said writ is as follows:

‘1911.

IN THE SUPREME COURT OF  
BRITISH COLUMBIA  
BETWEEN

P 514 POWELL RIVER PAPER COMPANY,  
11W. M. LIMITED,

CANCELLED

Plaintiff,

LAW.

and

STAMP WELLS CONSTRUCTION COMPANY  
50 cts. and AMERICAN SURETY COM-  
PANY OF NEW YORK,

Defendants.

GEORGE V., by the Grace of God, of the United  
Kingdom of Great Britain and Ireland, and of  
the British Dominions Beyond the Seas, King,  
Defender of the Faith, Emperor of India,

To

WELLS CONSTRUCTION COMPANY, a body  
corporate having its head office in the Province  
of British Columbia at the City of Vancouver  
and to

AMERICAN SURETY COMPANY OF NEW  
YORK registered in the said [43] Province  
of British Columbia at said City of Vancouver.

WE COMMAND YOU, that within eight days  
after the service of this Writ on you, inclusive of the  
day of such service, you do cause an appearance to  
be entered for you in an action at the suit of

POWELL RIVER PAPER COMPANY,  
LIMITED

(S. C.  
Seal)

AND TAKE NOTICE, that in default of your so doing the Plaintiff may proceed therein, and judgment may be given in your absence.

Seal of  
the Supreme  
Court  
of B. C.

WITNESS, The Honourable GORDON HUNTER, Chief Justice, the 27th day of April, in the year of our Lord one thousand nine hundred and eleven.

N. B.—That Writ is to be served within twelve calendar months from the date hereof, or, if renewed, within twelve calendar months from the date of such last renewal, including the day of such date, and not afterwards.

Vancouver  
Apr. 27,  
1911.  
Registry,

The defendant may appear hereto by entering an appearance, either personally or by solicitor, at the office of the District Registrar of this Honourable Court at Vancouver, British Columbia.

The Plaintiff's claim is against the defendant the Wells Construction Company for damages for breaches of an agreement dated the 2d day of June, 1910, and made between the plaintiff of the first part and the defendant the Wells Construction Company of the Second Part and against the defendant American Surety Company of New York under a bond dated the 24th day of June, 1910, duly executed by American Surety Company of New York conditioned

for the faithful performance by the Wells Construction Company of the said agreement of the second day of June, 1910, and which bond was extended by a bond dated the — day of July, 1910, duly executed by American Surety Company of New York for indemnity in respect of said damages as in the said bond dated the 24th day of June is mentioned.

Endorsements:

1911.

In the Supreme Court of British Columbia.

Powell River Paper Company Ltd.

vs.

Wells Construction Co. and American Surety Company of New York.

General Form

Writ of Summons.

This Writ was issued by David Stevenson, Wallbridge of [44] the firm of Bowser, Reid & Wallbridge whose address for service is 505 Hastings St. West, Vancouver, B. C. Solicitor for the said Plaintiff whose registered office is Winch Building, Hastings Street, Vancouver, B. C.'

And you are hereby notified and required to appear and defend said suit in behalf of the American Surety Company of New York; and you are further notified that in the event you do not, you will be

bound by the judgment rendered in said cause.

(Signed) AMERICAN SURETY COM-  
PANY OF NEW YORK,

By LIVINGSTON B. STEDMAN,

Its Resident Vice-President.

(Signed) HASTINGS & STEDMAN,

Attorneys for American Surety Company of New  
York.

I accept service hereof on behalf of the Deft.  
The American Surety Company of New York and  
undertake to appear in due course.

Dated 27 April, 1911.

D. G. MARSHALL,

Deft. Solr.

D. S. WALLBRIDGE,

Plaintiff's Solicitor."

Par. II.

And thereby the said Peter Sandberg was fully  
informed of the claim against this plaintiff and of  
the said action that was pending and had full oppor-  
tunity to defend the judgment.

Par. III.

That the said Peter Sandberg did not defend nor  
pay or give any attention to the said notice so served  
upon him and the said codefendant Mathilda Sand-  
berg, although aware of said proceedings, did  
nothing likewise.

Par. IV.

That they, the said defendants, are precluded and  
estopped by the proceedings had and taken in the  
Courts of British Columbia from now setting up or  
being heard or allowed to allege or say any of said

matters or things, for that according to the law interpreted and adjudicated by the Circuit Court of Appeals of the Ninth Circuit in the case of *Burley v. Compagnie de Navigation Francaise* [45] set forth and at large in 194 Federal at page 335, no such defense is permissible in this Court, for that all of the same could have been made in the courts of British Columbia in defense of the matters then litigated and the same are now *res adjudicata* as to both of said defendants.

WHEREFORE, this plaintiff prays that it may have judgment as prayed in its complaint and that the defendants have nothing by their said answer and that plaintiff have its costs and disbursements herein as originally prayed and that may be hereinafter sustained and expended.

W. C. BRISTOL,  
ELLIS LEWIS GARRETSON,  
Attorneys for Plaintiff.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 7, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [46]

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**Separate Answer of Defendant Mathilda Sandberg.**

Comes now defendant Mathilda Sandberg, and answering plaintiff's complaint, admits, denies and alleges:

I.

Answering paragraph VI thereof, defendant admits that defendant Peter Sandberg signed and sub-

scribed the application for a contract bond, a copy of which application is set forth in said paragraph, but defendant denies that said Peter Sandberg signed and subscribed said application in order to enable said Wells Construction Company to take and obtain construction contracts in which said Peter Sandberg, or this answering defendant, or either of them, was interested.

And further answering said paragraph defendant alleges that defendant Peter Sandberg signed said application for the sole use, benefit and accommodation of the said Wells Construction Company, a corporation, and not for the use, benefit or profit of himself, or this answering defendant, or either of them, nor of the community consisting of said defendants, nor for the use and benefit of, or for any purpose in which said defendants, or either of them, or the community consisting of said defendants was interested in any manner whatsoever.

## II.

Answering paragraph VII of said complaint defendant admits that plaintiff executed the bond therein referred to, but denies each and every other allegation in said paragraph contained. [47]

## III.

Defendant denies knowledge or information sufficient to form a belief as to the allegations made and contained in paragraph X of said complaint, and therefore denies the same, except that defendant admits that Peter Sandberg has made no payments whatever to plaintiff on account of said indemnity agreement.



IV.

Defendant denies each and every allegation made and contained in paragraph XI of said complaint.

V.

Answering paragraph XII of said complaint, defendant denies that defendant Peter Sandberg was substantially, beneficially or in any other manner or way interested in the award and performance of said contract, or of any contract, or in obtaining said suretyship, or any suretyship in which said Wells Construction Company, or any person connected with it was concerned, and denies that said suretyship was entered into by said Peter Sandberg for his special benefit, or for the benefit and protection of his property, its income or earnings, or for the benefit of the income, earnings or property of the community consisting of this answering defendant and said Peter Sandberg.

And further answering said paragraph, defendant alleges that said application and indemnity agreement was signed by defendant Peter Sandberg for the sole use, benefit, profit and accommodation of said Wells Construction Company and third parties, and not for the use, benefit or profit of this answering defendant, or of her codefendant Peter Sandberg, nor of the community consisting of this defendant and her codefendant Peter Sandberg.

VI.

Answering paragraph XIII defendant denies that defendant Peter Sandberg contracted with plaintiff in the manner set [48] forth in the preceding paragraphs of plaintiff's complaint, in the

prosecution of the community estate, business and enterprises, and in such manner that the community would and did obtain the benefit of the continuance of the business of the Wells Construction Company, and of contracts entered into between it and the Powell River Paper Company, Ltd., on or about the 2d day of June, 1910, for the construction of a dam and canal on Powell River in British Columbia, or at all, and denies that defendants, or either of them, or the community consisting of defendants, was in any way interested in, or participated in, or entitled to participate in the profits derived from the operations of said Wells Construction Company in the Province of British Columbia or at any other place, and denies that defendant Peter Sandberg entered into said contract with the plaintiff on any understanding or agreement that he, or defendant, or the community consisting of this answering defendant and said Peter Sandberg would thereby, and did obtain the postponement of payment and discharge of any indebtedness whatsoever of either of said defendants, or of said community, estate and business to said Wells Construction Company.

Further answering said paragraph defendant alleges that the execution of said indemnity agreement by defendant Peter Sandberg was without consideration either to himself or this answering defendant, or to the community consisting of defendants, or for the use, benefit or profit of defendants, or either of them, but was for the sole use, benefit, profit and accommodation of third parties.

VII.

Answering paragraph XIV defendant denies knowledge or information sufficient to form a belief regarding the matters and things therein set forth, and therefore denies the same, except defendant admits that defendant Peter Sandberg has not [49] paid to plaintiff any portion of the amounts therein referred to.

SECOND.

Further answering said complaint, and by way of an affirmative defense and demand for affirmative relief herein, defendant alleges:

I.

That defendant and her codefendant Peter Sandberg are, and since November 30th, 1894, have been, husband and wife.

II.

That defendants are the owners of real property in the Counties of Pierce and King, in the State of Washington, as follows:

Lots 13 and 14, in Block 1104; Lots 10, 11 and 12, in Block 1403; Lots 7 and 8, in Block 1101; and Lots 11 and 12, in Block 1303, in the City of Tacoma, as the same are designated upon a certain map entitled, "Map of New Tacoma, Washington Territory," which map was filed for record in the office of the County Auditor of said County, February 3, 1875.

Also the following described tract:

Beginning at the intersection of the North line of Lower Eleventh Street South with the East line of the City Waterway, as shown on the Supplemental Plat of Tacoma Tide Lands; thence Easterly along

the North line of lower 11th Street 393.206 feet; thence Northerly along a line making an angle of 73 degrees, 50 minutes 02 seconds with the last described course 184.181 feet; thence Westerly along a line at right angles to the line last described 356.033 feet to the Eastern line of the City Waterway 77.77 feet to the point of beginning. Also commencing at the intersection of the North line of Lower South 11th Street with the East line of City Waterway above described; thence Easterly along the North line of Lower South 11th Street 476.499 feet, to the place of beginning of the tract herein described; thence Northerly along a line making an angle of 73 degrees 50 minutes 02 seconds with the last described course 173.510 feet; thence Southerly along a line at right angles to the last described course 302.416 feet to the North line of Lower South 11th Street; thence Westerly along said North line of Lower South 11th Street 175.133 feet to the place of beginning.

Lots 1, 2, 3 and 4, Block 1112 Tacoma Land Company's Addition;

Lots 11 and 12, Block 7638 Tacoma Land Company's Seventh Addition;

Lot 1, Block 61, Balch's Addition to Steilacoom, Pierce County, Washington; [50]

West  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  less  $1 \frac{38}{100}$  acres, and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  Section 8, Township 8. Range 5 East, Pierce County;

West half of Section 2, Township 20, Range 7 King County, Washington;

North  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  of Section 12, Township 20,

Range 7, and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  Section 12, Township 20, Range 7, King County, Washington.

Southwest quarter of Section 6, Township 20, Range 8, King County, Washington.

East  $\frac{1}{2}$  of Southeast  $\frac{1}{4}$ , Section 10, Township 20, Range 8, King County, Washington.

All of which said property was acquired after the marriage of defendants by their joint efforts and not by gift, bequest or inheritance.

WHEREFORE, defendant prays that said action may in so far as this answering defendant is concerned, be dismissed, and that she have a judgment for her costs herein.

Defendant further prays that if any judgment be rendered herein against her codefendant Peter Sandberg that the same be adjudged and decreed to be his separate debt, and that it be adjudged and decreed that the same is not a debt or obligation of the community consisting of this defendant and her codefendant Peter Sandberg, and that the same is not, and does not constitute a lien upon the community real property of defendants, and that the real property hereinabove described be adjudged to be the community property of defendants.

BATES, PEER & PETERSON,

Attorneys for Defendant, Mathilda Sandberg,

Office and Postoffice Address:

1107 Natl. Realty Bldg.,

Tacoma, Washington. [51]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jun. 4, 1915.

Frank L. Crosby, Clerk. By F. M. Harshberger,  
Deputy. [52]

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**Stipulation to Try Cause to Court.**

It is hereby stipulated that this cause shall be tried by the Court and before the Court without a jury.

W. C. BRISTOL and  
ELLIS L. GARRETSON,  
Attys. for Plaintiff.

BATES, PEER & PETERSON,  
Attys. for Defendant.

Filed in the U. S. District Court, Western Dist.  
of Washington, Southern Division. Jun. 4, 1915.  
Frank L. Crosby, Clerk. By F. M. Harshberger,  
Deputy. [53]

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**Opinion.**

W. C. BRISTOL, ELLIS LEWIS GARRETSON,  
for Plaintiff.

BATES, PEER & PETERSON, for Defendants.

**DECISION ON THE MERITS.**

CUSHMAN, District Judge.

Plaintiff sues to recover against the defendants on account of an agreement entered into by the defendant Peter Sandberg to indemnify the plaintiff in giving a bond for the performance by the Wells Construction Company of a certain contract for the construction of a dam and canal in British Columbia, for the Powell River Paper Company.

Plaintiff alleges the bringing of a suit in British

Columbia against it upon the bond; that it called upon the defendant Peter Sandberg to defend that action and that a judgment was obtained in such action against plaintiff in the sum of \$13,632.94. It alleges that, by paragraph 10 of the indemnity agreement, set out below, the defendant Peter Sandberg contracted with the plaintiff in the prosecution of the business of the community consisting of the two defendants and that the community thereby obtained the benefit of the continuance of the business of the Wells Construction Company and obtained the postponement of payment and discharge of indebtedness of Peter Sandberg and the community, estate and business from liability thereon to said Wells Construction Company.

Plaintiff asks judgment against Peter Sandberg and Mathilda Sandberg, his wife, to the extent of her interest [54] whatever it may be, for \$25,000 and interest, and the additional sum of \$1,449.85 and interest, the latter item on account of plaintiff's expenses in defending the suit against it in British Columbia.

Defendants, by separate answers, deny that either of them or the community formed by them was interested in the Wells Construction Company's contract with the Powell River Paper Company and aver that Peter Sandberg signed the application for the sole use, benefit and accommodation of the Wells Construction Company, without consideration to the defendants of the community and not in the prosecution of any business of the community. They deny that Peter Sandberg signed the application

with any understanding for the postponement of payment or discharge of any debt to the Wells Construction Company. Defendants interposed general denials to other portions of the complaint and set out the date of their marriage, a description of the community property and pray for a dismissal of the action and, in the alternative, that, if judgment be rendered against Peter Sandberg, that it be against him individually and that it be adjudged that the debt is not an obligation of the community; that it be adjudged that the defendants' property described in the answer is community property not subject to the lien of any judgment rendered.

Plaintiff, in its reply, denies that the defendant Peter Sandberg signed the application for the accommodation of the Wells Construction Company and avers that he did so for the benefit and profit of both defendants and the community. Plaintiff sets up the recitals of paragraph 10 of the application as representations of the defendant Peter Sandberg that he had an interest in the Wells Construction Company's contract and of the benefit to the defendants of plaintiff's suretyship, by way of estoppel, and [55] alleges that, at the time Peter Sandberg signed the application, the defendants were indebted to the Wells Construction Company to the amount sued for herein. Plaintiff further alleges the giving of notice to Peter Sandberg of the bringing of suit against it in British Columbia in which notice he was called upon to defend that action, and alleges that the judgment obtained in that action is *res adjudicata*.



In June, 1910, the Wells Construction Company applied to plaintiff for a surety bond in the amount of \$25,000. The application was denied for want of indemnitors. Thereafter, on the 20th of June, the same year, another application was made, signed by the Wells Construction Company and, among other indemnitors, the defendant Peter Sandberg. This application contained the following provisions:

“IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same.

\* \* \*

“VI. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety, to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety's intent so to do, or on making such request, place the Surety in possession of

funds or securities, approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding from the State Court to the Federal Court, in any State where such action would in any way affect the Surety's license or right to transact business. \* \* \* [56]

“IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication by reason of such suretyship, shall be prima facie evidence of the fact and of the extent of the indemnitor's liability therefor to the Surety.

“X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special

benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

This application was upon a printed form, evidently prepared by the plaintiff. Upon this application, plaintiff executed its bond in the sum of \$25,000 to the Powell River Paper Company, conditioned for the indemnifying of that company against any failure on the part of the Wells Construction Company to perform its contract.

The evidence introduced shows that the defendants were married in 1894; that all of the real property described in their answers is community property. In view of the terms of paragraph VI of the application above set out, it is not necessary for the plaintiff to prove that it has paid or satisfied the judgment obtained against it in order to prevail.

Plaintiff and defendants have stipulated as to plaintiff's items of expense incurred in defending the suit in British Columbia in the amount of \$1,556.20. The effect of this stipulation is to amend the complaint to that extent.

A certified copy of the judgment obtained against it in British Columbia was offered by the plaintiff upon the trial. It [57] was objected to as not properly certified or authenticated. The copy purports to be certified as a true copy by A. B. Pottinger, District Registrar. There is impressed upon

the copy what purports to be the seal of the Supreme Court of British Columbia. A certificate is attached of David L. Wilbur, Consul General of the United States of America in Vancouver, B. C., to the effect that A. B. Pottenger is a duly appointed and commissioned registrar of the Province of British Columbia.

The objection made is that there is no certificate by the Consul General, or otherwise, that the signature to the copy is that of A. B. Pottenger. Further, that there is no certificate that A. B. Pottenger is the legal custodian of such records and that there is no certificate that the purported seal is the seal of said court.

Section 905, R. S., applies only to the authentication of records of judicial proceedings had in the states and territories. It is conceded that there is no statute providing for the authentication of judicial proceedings in foreign countries. No treaty touching the question has been called to the Court's attention. Justice Gray in *Hilton v. Guyot*, (159 U. S. 113, at 228), intimates that there is neither statute law nor treaty on the subject of foreign judgments.

The defendants in their answers deny upon information and belief the allegations of the complaint as to the rendition of the judgment by the Supreme Court of British Columbia against the plaintiff. Plaintiff now contends that, the judgment being a matter of public record, the denial is insufficient. Plaintiff did not move against this denial in the answer, but raises the question upon the argument

after the introduction of all the evidence.

The authorities are not uniform upon the question of [58] whether it is incumbent upon the plaintiff to move to strike out such denial as sham in order to take advantage of such situation. The weight of authority appears to be that he must do so.

1 Encyc. Pl. & Pr. 812, Note;

31 Cyc. 200, 201, Note 8.

In the Case of *Wallace v. Bacon* (86 Fed. 553), before Judge Ross, the matter came up on motion to strike the denials from the answer. Objections of a not dissimilar nature have been held waived by not moving against them as a step preliminary to trial.

*Shepherd v. Baltimore etc. R. R. Co.*, 130 U. S. 426 at 433;

*Keator Lbr. Co. v. Thompson*, 144 U. S. 434;

*Town of Denver v. Spokane Falls*, 7 Wash, 226 at 229;

*Howard v. Hibbs*, 22 Wash. 513, at 516.

In *Peacock vs. United States* (125 Fed. 583), the motion to strike out a denial where there was presumptive knowledge on the part of the defendant, was held to be the appropriate remedy.

Where a motion to strike lies, a failure to interpose it, is held to be a waiver.

31 Cyc. 718-2.

In order to deprive the defendants of the right, under the code, to interpose such denial, the matter so denied must be presumptively within his knowledge.

1 Encyc. Pl. & Pr. 811;

31 Cyc. 200.

The defendant has been held to have such presumptive knowledge and not allowed to so deny allegations as to his personal acts, or those of his agent, or concerning public records to which he has access, or allegations that a judgment had been rendered against him. [59]

1 *Encyc. Pl & Pr.* 813 & 814.

No case has been called to the Court's attention where it has been held that the defendant is presumed to know matters of record in foreign countries and no persuasive reason has been advanced for so holding. The public record, the existence of which he may not deny upon information and belief, is a public record to which he has access, as the rule is stated in the *Encyclopedia of Pleading and Practice* above cited. A more exact statement of the rule is found in 31 *Cyc.* 200:

“Nor can facts which are readily accessible by reason of being public records, or otherwise, be put in issue by such form of denial.”

Having access in the sense in which these words are used includes, not only the legal right of access, but a reasonable opportunity to avail oneself of that right.

In the complaint it is alleged that both of the defendants are, and were at all times in question, citizens and residents of the State of Washington. It may be presumed that the defendants would have the right in British Columbia to examine the records of the Supreme Court, that is, it may be presumed that they are public records of that Province, but it is not reasonable to require a citizen of this

country to journey to foreign lands to inform himself concerning the contents of public records there in order to qualify himself to answer a suit brought against him in this country.

Having had notice of the pendency of the proceedings and been called upon to defend, defendant Peter Sandberg is now estopped to deny the conclusiveness of any judgment rendered.

Robbins v. Chicago, 4 Wall. 657; 18 Law Ed. 430;

[60]

Wash. Gas Light Co. v. District of Columbia,  
161 U. S. 316; 40 Law Ed. 712 at 719;

Compagnie v. Burley, 183 Fed. at 168; aff'r'd  
194 Fed. 335.

But, not having been a party to the action in British Columbia, nor shown to have had anything to do with its conduct, he has a right to insist on strict proof of the judgment, unless, in common with all citizens of this commonwealth, he is presumed to know the contents of the records of the courts of British Columbia.

Residents of this country are presumed to have knowledge of its laws and may be presumed to have knowledge of its records, but such does not apply to either the laws or the records of foreign countries.

In *Wallace v. Bacon* (86 Fed. 553), Judge Ross held a defendant in the Southern District of California to have presumptive knowledge of the levying of an assessment by the Comptroller of the Currency against a National Bank of the State of Missouri.

It may be said that the records of the Supreme Court of the Province of British Columbia are not

so distant as the records of which the defendant in that case was presumed to have knowledge, but, unless the fact of their being records of a foreign country is made the test, a party might be held to have presumptive knowledge of the records in Thibet or Patagonia. A party cannot in reason be required to acquaint himself with all the records of the countries of the globe. To draw the line at the boundaires of his own country seems more reasonable than to extend it to the confines of Christendom, or to the countries having the civil or common law, or all.

In *Oregon Ry. Co. v. Oregon Ry. & Nav. Co.* (22 Fed. 245), Judge Deady writing the opinion, it is said: [61]

“Now, upon the facts stated in this case, there can be no presumption that the defendant has any personal knowledge concerning the existence or contents of the documents made and registered in Great Britain, by means of which the plaintiff claims to have become a corporation. How can such presumption arise? The defendant was an utter stranger to the proceeding, and there is no evidence that it or those who represent it, and through whom its knowledge must come, ever saw or examined the documents for any purpose. Neither is a party under any obligation to inform himself concerning any matter of fact, so that he may answer an allegation relating to it, positively, unless it be to recall and verify that knowledge or information of the matter which he once had



and is still presumed to have, but which may have become dim or confused in his mind by reason of the lapse of time or other circumstances. And if such a denial is improperly made, it may be stricken out as sham—manifestly false, in fact. But it is not for that reason either “frivolous” or immaterial.” That depends wholly on the character of the allegation denied. If that is material, the denial of all knowledge or information concerning it is also material” (at pp. 247 and 248).

This case was reconsidered in 23 Federal, 232. While nothing is said in the latter opinion to indicate a change in the rule as announced in the former case, the defendant was not allowed to question plaintiff’s corporate existence, the effect of the ruling being that, having contracted with the plaintiff as a corporation, defendant would be estopped to deny its corporate existence.

*Cowie v. Ahrenstedt*, 1 Wash. 416 at 418 & 419;  
*Vassault v. Austin*, 32 Cal. 597.

The latter case is cited with approval in 1 Washington, at 419.

Having reached the conclusion that defendants’ denials were sufficient, it is not necessary to determine whether the plaintiff waived its right to object to the form of denial by not interposing a preliminary motion to strike from the answer.

No case has been cited holding a record of a foreign judgment certified as in this case, admissible in evidence. The only case found that appears to sustain its admissibility is an early case [62] in

Vermont. (Woodbridge v. Austin, 2 Tyler, 364, 4 Am. Dec. 740.) It was held in this case that the exemplifications of the record of a foreign judicial proceeding would be considered *prima facie* as correct. The great weight of authority, however, is to the contrary. (23 Cyc. 1611 and 1612, note 54.)

“In order that a foreign judgment should be admissible in evidence, it is necessary that the exemplification of it which is produced should be duly authenticated. And this authentication should consist of the seal of the court, if it has one, the certificate of the officer in whose custody the record remains, the attestation of the principal judge of the court to the official character of the person certifying, and the whole fortified by the certificate of the executive department of the state or country and the impress of its great seal.” (Black on Judgments, Vol. II, p. 849.)

Cruz v. O’Boyle, 197 Fed. 824.

No reason is shown for any exception in the present case to the rule embodied in the foregoing.

The defendant Mathilda Sandberg had no knowledge that Peter Sandberg had signed the application to plaintiff for its execution of the surety bond. All of the evidence is to the effect that neither of the defendants had any financial interest in the Wells Construction Company; that Peter Sandberg signed the application at the request of Simon Mettler, an old friend of his. Joseph Wells, the Secretary of the Wells Construction Company also asked him to sign, but he received nothing for so doing. There

was no understanding that he should receive anything.

The only matter between the defendants and the Wells Construction Company at the time of signing this application was that the Wells Construction Company was then constructing a building for defendants. This building was substantially completed and paid for at the time of the signing of this application. It was paid for entirely in cash by Peter Sandberg and there was [63] no consideration of value passed to either of the defendants on account of the signing of the application, nor was anything contemplated. The Wells Construction Company was then in good financial standing.

Under these circumstances, it is clear that the mere fact that the defendant Peter Sandberg had, at the time of signing the application, other contractual relations with the Wells Construction Company would not make him other than an accommodation indemnitor and, of itself, would not make a debt growing out of the indemnity agreement the debt of his wife or the community.

The fact that Peter Sandberg paid, direct, certain materialmen furnishing supplies for the construction of the Kentucky Liquor Company building under a contract with the Wells Construction Company is not unusual conduct under such circumstances. His becoming an indemnitor for the Wells Construction Company is inconsistent with the claim that he then feared or believed the Wells Construction Company was not financially sound and that, thereby, he would protect any community interest in the completion of

the Kentucky Liquor Company building.

The community property statute of the State of Washington provides:

“Property not acquired or owned, as prescribed in sections 2400 and 2408 (by gift, devise or inheritance) acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with *alike* power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.”

Debts incurred by the husband in the prosecution of any business which, if successful, will result in profit to the community are community debts.

*McDonough v. Craig*, 10 Wash., 239, at 241. [64]

If all debts incurred by the husband are *prima facie* community debts, as indicated in the foregoing decision, that *prima facie* presumption is conclusively overcome by the evidence in the present case showing that no profit or benefit could result to the community from the act of Peter Sandberg in signing the application or from the transaction or business with which it was connected.

In *Milne v. Kane* (64 Wash. 254) and *Woste v. Ruge* (68 Wash. 90), where the community was held liable for the tort of the husband, it was only so held upon the finding that the tort committed by him while engaged in a business conducted for the benefit of the community.

In *McGregor v. Johnson* (58 Wash. 78), where the

community was held liable for the successful fraud practiced by the husband, it was only so held upon a finding that the wrongful profit from the fraud inured to the benefit of the community.

The community is liable where the husband signs an obligation as surety, or accommodation maker for a corporation in which he is a stockholder or director, but if not interested in such corporation at or prior to the time of incurring such obligation, the community is not liable.

Horton v. Donohoe Kelly Bank Co., 15 Wash.

399;

Shuey v. Holmes, 20 Wash. 13;

Shuey v. Holmes, 22 Wash. 193.

The community will be estopped to deny the husband's debt incurred for the benefit of the community and with the wife's knowledge.

McGregor v. Johnson, 58 Wash. 78. [65]

But it will not be estopped where the husband incurs the debt without the wife's knowledge and it is not in the prosecution of community business and cannot, in the ordinary course, result in any benefit to the community.

Brotton v. Langert, 1 Wash. 73;

Gund v. Parke, 15 Wash. 393;

Bird v. Steele, 74 Wash. 68 at 70;

Spinning v. Allen, 10 Wash. 570.

Another one of the indemnitors, a stockholder in the Wells Construction Company, promised to indemnify Peter Sandberg for signing the application in question. Later Peter Sandberg brought a suit to enforce this provision for indemnity. He also,

about the time he signed the application in question, became security on certain notes of the Wells Construction Company. Later, after that company got into financial difficulties, its stock was delivered to the attorneys for Peter Sandberg, pending an investigation by him as to whether he would undertake the completion of the company's work in British Columbia in order to save himself. He also caused certain property to be deeded over to a company of which he owned the stock, the object of such transaction being to secure certain notes upon which he had become security. The result would be an indemnification of himself proportioned to the value of the property as transferred.

A large amount of evidence has been taken in connection with these later transactions, but nothing more is shown in any of them than an attempt by Peter Sandberg to save himself, so far as he could, from the liability he had incurred on account of the Wells Construction Company. There is nothing in any of these transactions to show in any way a chance of benefit or [66] gain to the community. The effect of lessening the loss flowing from these obligations would not make community business out of his separate affairs.

Plaintiff is entitled to judgment against Peter Sandberg for its expenses, fixed by the stipulation at \$1,556.20 and interest thereon.

This case having been tried to the court without a jury, at the time the exemplification of the record of judgment was offered in evidence by the plaintiff and objection made, the record was admitted tenta-

tively, a final ruling being reserved. Having reached the conclusion that the objection should have been sustained, it is clear that failing to rule finally at the time of the offer, the plaintiff may have been prejudiced in that, if such ruling had then been made, plaintiff could have asked for a continuance in order to supply a legal authentication of the copy. The making of findings and final judgment herein will be delayed ten days to afford the plaintiff an opportunity to move to reopen the case for such purpose.

It is not necessary to determine whether the recital of interest in paragraph 10 of the application estops Peter Sandberg, as he is bound in any event. No right of recovery has been established against Mathilda Sandberg or the community. The debt established is that of Peter Sandberg and the community real estate is not subject to any lien on account of the judgment herein.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jul. 31, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [67]

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### **Requests by the Plaintiff for Findings of Fact and Conclusions of Law.**

Comes now the plaintiff American Surety Company of New York, by its attorney, and pursuant to the civil procedure prescribed in the courts of the United States by the Acts of Congress, requests the Court, upon the pleadings and upon the evidence, documentary and oral, introduced in this cause to

find the facts and conclusions therefrom as follows:

### **Findings of Fact.**

#### **FIRST FINDING:**

That on the 20th day of June, 1910, Peter Sandberg, in the regular ordinary course of business, subscribed, sealed and acknowledged the application and indemnity agreement bearing date on that day and designated herein "Plaintiff's Exhibit 2."

#### **SECOND FINDING:**

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same."

#### **THIRD FINDING:**

That said application and indemnity agreement so signed by [68] Peter Sandberg contained, among other provisions, the following:



“VII. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety, to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety’s intent so to do, or on making such request, place the Surety in possession of funds or securities, approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding from the State Court to the Federal Court, in any State where such action would in any way affect the Surety’s license or right to transact business.”

#### FOURTH FINDING:

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

“IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication, by reason of such suretyship, shall be *prima facie*

evidence of the fact and of the extent of the indemnitor's liability therefor to the Surety."

#### FIFTH FINDING:

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special [69] benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

#### SIXTH FINDING:

Peter Sandberg and Mathilda Sandberg, the defendants, were married in November, 1894, and from that time down to the present had, used, owned, or possessed no other property than community property.

#### SEVENTH FINDING:

That at the time Peter Sandberg signed Plaintiff's Exhibit 2, June 20, 1910, there was no other property in the possession or under the control of said Peter

Sandberg or which he then or thereafter had than the community property and estate of himself and his wife, the defendant Mathilda Sandberg, and the rents, earnings, issues and income derivable therefrom.

**EIGHTH FINDING:**

That on the 24th day of June, 1910, in pursuance of the application and contract of indemnity mentioned in the foregoing finding, plaintiff made, executed and delivered its standard form of contract bond with Wells Construction Company as principal and itself as surety to Powell River Paper Company, Ltd., of Vancouver, B. C., in the penal sum of twenty-five thousand dollars (\$25,000.00), and the same was received in evidence in this case and marked "Plaintiff's Exhibit 3."

**NINTH FINDING:**

That on the 27th day of April, 1911, Powell River Paper Company, [70] Ltd., in the Supreme Court of British Columbia, issued its writ and brought a suit against Wells Construction Company and American Surety Company of New York.

**TENTH FINDING:**

That on the 17th day of May, 1911, there was served upon defendant Peter Sandberg at his residence in Tacoma, Washington, and at the residence of Mathilda Sandberg in Tacoma, Washington, a notice of said suit or action so brought by said Powell River Paper Company, Ltd., giving the particulars thereof and notifying and requiring Peter Sandberg to appear and defend said suit; that neither of the defendants appeared or defended said suit.

## ELEVENTH FINDING:

That thereafter such proceedings were had in said Supreme Court of British Columbia that on Monday, the 5th day of May, 1913, there was rendered and given a judgment in said cause against Wells Construction Company for thirty-one thousand six hundred thirty-two and 94/100 dollars (\$31,632.94) and against American Surety Company of New York for the amount of its said bond in the sum of twenty-five thousand dollars (\$25,000.00) and the penalty of said bond in words and figures as follows, to wit:

“And this Court doth further order and adjudge that the plaintiff do recover against the defendant Wells Construction Company the sum of \$31,632.94 for such expenditures aforesaid and against the defendant American Surety Company of New York, as surety, the sum of \$25,000.00 upon their said obligation.”

## TWELFTH FINDING:

That on June 20, 1910, when the contract of indemnity, “Plaintiff’s Exhibit 2,” was signed by Peter Sandberg, the Wells [71] Construction Company was then constructing a building for Peter Sandberg and Mathilda Sandberg, his wife, under and pursuant to the terms of a contract designated herein Defendants’ Exhibit “A,” and that at said time, June 20, 1910, said building was not completed.

## THIRTEENTH FINDING:

That on June 20, 1910, Wells Construction Company, together with Simon Mettler and George Vergowe executed to Peter Sandberg an indemnity agreement to save and keep harmless the defendants

from any liability under Plaintiff's Exhibit 2, and said agreement was introduced and received in evidence herein as "Plaintiff's Exhibit 10."

**FOURTEENTH FINDING:**

That on the 3d day of October, 1910, Wells Construction Company rendered and made its statement of account to Sandberg claiming a balance of thirty-five thousand dollars (\$35,000.00) then due.

**FIFTEENTH FINDING:**

That on November 26, 1910, Kentucky Liquor Company, with Wells Construction Company, Simon Mettler and George Vergowe made and entered into an agreement in writing as introduced in evidence herein in words and figures as follows, to wit:

This agreement, Made and entered into this 26th day of November, A. D. 1910, between the KENTUCKY LIQUOR COMPANY, a Washington corporation, THE WELLS CONSTRUCTION COMPANY, a Washington corporation, George Vergowe and Carrie Vergowe, his wife, parties of the first part, and SIMON METTLER, party of the second part, WITNESSETH; Whereas the Wells Construction Company has heretofore conveyed by deed of conveyance to the Kentucky Liquor Company, a corporation, as trustee for Peter Sandberg, and the Bank of Vancouver, a British Columbia corporation, The Molsons Bank, a British Columbia corporation, both of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to wit: [72]

Dia. Twelve (12), Lot Fifteen (15), Section Eleven (11), Township Twenty (20), Range

Three (3) East; Lots Five (5) to Fourteen (14), Block 8858, Indian Addition; Lots Eighteen (18) and Nineteen (19), Block 8050, Indian Addition; Lots Nine (9) to Twenty-six (26), Block 8150, Indian Addition; Lots Nineteen (19) to Twenty-six (26), Block 8249, Indian Addition; North  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , of NW.  $\frac{1}{4}$  Sec. 14, Twp. 20, Range 3 E.

And whereas George Vergowe and Carrie Vergowe, his wife, have heretofore transferred and conveyed by deeds of conveyance to Kentucky Liquor Company, a Washington corporation, as trustee for Peter Sandberg, and the Bank of Vancouver, a British Columbia corporation, of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to wit:

The North Thirty (30) acres of the Northwest Quarter ( $\frac{1}{4}$ ) of the Northwest Quarter ( $\frac{3}{4}$ ) of Section Thirteen (13), Township Twenty (20), Range Three (3) East; also the Northwest Quarter ( $\frac{1}{4}$ ) of the Southwest Quarter ( $\frac{1}{4}$ ) of the Northwest Quarter ( $\frac{1}{4}$ ) of the same section, township and range,

—which said conveyance by said Wells Construction Company and George Vergowe and Carrie Vergowe, his wife, of said real property above described was made for the purposes and given as collateral security for the payment of certain indebtedness of the Wells Construction Company, to wit:

A note for Fifty-five Thousand (\$55,000) Dollars, made by the Wells Construction Company to the said

Molsons Bank, a corporation dated at Vancouver, B. C., ———, 1910, and further to indemnify and save harmless said Peter Sandberg against liability as endorser of said notes of said Bank of Vancouver and said The Molsons Bank, a corporation, and further to indemnify said Peter Sandberg against liability as surety on said contract bonds of said Wells Construction Company, as follows:

One to the Powell River Paper Company, Ltd., in the principal sum of Twenty-five Thousand (\$25,000) Dollars; one to the Metropolitan Building Company, Ltd., in the principal sum of Twenty-seven Thousand (\$27,000) Dollars; one to the City of Vancouver in the principal sum of Ten Thousand (\$10,000) Dollars; one to the Pacific Investment Company, Ltd., in the principal sum of Three Thousand (\$3,000);

And whereas Simon Mettler, above named, is the holder of demand promissory notes of the said Wells Construction Company amounting to [73] Seventy-nine Thousand, Five Hundred Dollars (\$79,500), besides interest;

And whereas said Mettler is the holder of one share of the capital stock of said Wells Construction Company, a corporation;

And whereas said Wells Construction Company has expended and invested large sums of money in the performance of certain contracts entered into by it with said Powell River Paper Company, Ltd., Metropolitan Building Company, Ltd., City of Vancouver, a municipal corporation, and Pacific Investment Company, Ltd., a numerous other persons,

which it is necessary to carry to completion to save said Wells Construction Company from becoming insolvent;

And whereas said Simon Mettler is desirous of withdrawing from said corporation, and relieving the same from liability on account of the indebtedness owing him from said corporation in consideration of said corporation carrying on its said business and paying off and discharging its creditors whose claims and accounts said Peter Sandberg has become surety for.

IT IS NOW THEREFORE AGREED, between said parties, that the Kentucky Liquor Company, a corporation, trustee as aforesaid, will hold the title to the lands and premises hereinbefore described for the purposes hereinbefore referred to until such time as it shall be necessary to apply and exhaust the same for the purposes for which it was conveyed as hereinbefore set forth.

That the Wells Construction Company will apply and exhaust all of its property and assets in payment and discharge of its said obligation on which said Peter Sandberg is endorser, or has become liable in any manner whatever, and thereafter said Kentucky Liquor Company, trustee, shall apply by conversion, or otherwise, as much of said property above described as may be necessary to satisfy and discharge the balance, if any, of said claims on which said Peter Sandberg may in any manner be liable, and the surplus, if any, of said property remaining in the hands of said Kentucky Liquor Company, trustee, for fur-



ther paying and discharging all of said claims and demands of said Bank of Vancouver and the Molsons Bank, a corporation, and Peter Sandberg shall be conveyed by proper deeds of conveyance to Simon Mettler.

IN WITNESS WHEREOF, the Wells Construction Company, a corporation, and the Kentucky Liquor Company, a corporation, have by resolutions of their respective Board of Directors, duly asked [74] and recorded, authorized their President and Secretary, respectively, to execute these presents and attached the corporate seals of said corporations, respectively, hereto.

IN WITNESS WHEREOF, said parties have hereunto set their hands and seals at Tacoma, Washington, this 26th day of November, A. D. 1910.

KENTUCKY LIQUOR COMPANY, a Corporation.

By (PETER SANDBERG,)

Its President.

Attest (P. H. LUCK,)

Secretary.

WELLS CONSTRUCTION COMPANY, a Corporation.

By (CHARLES T. PETERSON,)

Its President.

Attest (NEWTON H. PEER,)

Secretary.

(GEORGE E. VERGOWE.)

(SIMON METTLER.)”

That Elmer M. Hayden thereafter became successor trustee to Kentucky Liquor Company, under

said agreement in this finding set out.

**SIXTEENTH FINDING:**

That on November 29, 1910, Peter Sandberg rendered and made a statement of his account to Wells Construction Company therein claiming upwards of three thousand dollars due the community from said Wells Construction Company.

**SEVENTEENTH FINDING:**

That prior thereto and on the 19th day of October, 1910, agreements in writing providing for joint and several liability upon the part of Sandberg, Mettler, Vergowe and Wells were entered [75] into with Molsons Bank and the Bank of Vancouver in British Columbia, covering financial transactions and operations of the Wells Construction Company.

**EIGHTEENTH FINDING:**

That during all the times herein mentioned Messrs. Bates, Peer & Petersen were attorneys for Peter Sandberg and for Wells Construction Company and for the receiver of Wells Construction Company and for the Bank of Vancouver in the Mettler bankruptcy proceedings and for Molsons Bank in the Mettler bankruptcy proceedings and for Kentucky Liquor Company and Messrs. Peterson and Peer were on November 26, 1910, President and Secretary respectively of Wells Construction Company.

**NINETEENTH FINDING:**

That on February 20, 1911, in cause 30878 in the Superior Court of the State of Washington, Peter Sandberg swore to and filed a complaint wherein Peter Sandberg was plaintiff and Simon Mettler, Anna Mettler and Carl Mettler were defendants and

the same is in evidence in this cause as "Plaintiff's Exhibit 7," and therein and therefrom it appears that Peter Sandberg alleged and stated in respect of the transactions concerned in this case:

"III. That on or about said last date above referred to, to wit, the — day of August, A. D., 1910, the defendants Simon Mettler and Anna Mettler, his wife, and said George E. Vergowe and his wife and said Joe Wells and his wife, and the Wells Construction Company, a corporation, entered into an oral agreement with plaintiff, wherein and whereby in consideration of plaintiff's endorsing certain notes, bonds and guarantees, hereinafter particularly referred to, to enable said Wells Construction Company, a corporation, in which said persons were interested as stockholders, to get credit with which to raise money to carry on its said business of contracting and constructing buildings and improvements, for which said Wells [76] Construction Company then held contracts, it was agreed that they, said Vergowe and wife, and said Wells and wife, Simon Mettler and Anna Mettler, his wife, and Wells Construction Company, a corporation, would convey by deeds of conveyance certain real property in Pierce County, Washington, held and owned by them to fully secure and indemnify plaintiff on account of his endorsement of said notes, bonds, guarantees, and other commercial paper to enable said Wells Construction Company to obtain credit and money to carry on said business."

\* \* \*

“IV. That pursuant to said agreement so entered into, plaintiff on or about the — day of August, 1910, went with the defendant, Simon Mettler to the City of Vancouver, in the Province of British Columbia, where said Wells Construction Company, a corporation, was operating, and at said defendant’s request, and in accordance with said agreement hereinbefore referred to, endorsed certain promissory notes and a guarantee in writing to the Bank of Vancouver, of Vancouver, B. C., to the amount of \$25,000; plaintiff pursuant to said agreement so made with said defendant endorsed as a surety an indemnity bond to the American Surety Company in the sum of \$10,000, to enable said defendants and said Wells Construction Company to enter into a contract with the City of Vancouver, B. C., for the construction of a certain reservoir, and at the same time endorsed and signed an indemnity bond to said American Surety Company in the sum of \$25,000 to enable said defendants and said Wells Construction Company to enter into a certain contract with *onw* Powell River Paper Company, a corporation; that said notes and said guarantee are long past due and unpaid, and said contracts with said City of Vancouver and said Powell River Paper Company are yet uncompleted, and plaintiff is as yet unrelieved from the liability on account of said notes, guaranty and indemnity bonds.” \* \* \*

“XII. That the liability of plaintiff on account of the bonds, notes and guarantees exe-

cut by him pursuant to said agreement with the defendants Simon Mettler and Anna Mettler, his wife, hereinbefore set forth, has not as yet, and cannot for some time in the future be fully ascertained and fixed, but plaintiff alleges the fact to be that the sum will probably exceed \$30,000, over and above the securities and indemnity already held by plaintiff." [77]

**TWENTIETH FINDING:**

That Peter Sandberg paid direct certain materialmen furnishing supplies and laborers performing work, to wit, Tacoma Mill Company, to wit, one named Grosser, to wit, Olaf Halstead, for material and labor in the construction of the Kentucky Liquor Company building pursuant to Defendant's Exhibit "A" entered into with Wells Construction Company.

**TWENTY-FIRST FINDING:**

That on the 26th day of May, 1914, in cause No. 35,986 in the Superior Court of the State of Washington, in and for Pierce County, wherein the Molsons Bank, a corporation organized and existing under the laws of Canada, duly chartered under the laws of Canada, was plaintiff and Peter Sandberg and Mathilda Sandberg, his wife, were defendants, the defendants Peter Sandberg and Mathilda Sandberg, through and by their attorneys, Messrs. Bates, Peer & Peterson, in said court in said cause, in answer to interrogatories propounded to them, filed and made answer to said interrogatories as introduced in evidence in this cause as "Plaintiff's Exhibit 8" as follows:

“INTERROGATORY No. I.

Did the Wells Construction Company do any work for you or either of you, at any time before the execution of the note sued on in this case?

ANSWER TO INTERROGATORY No. I.

Yes.

INTERROGATORY No. II.

If you answer the preceding interrogatory in the affirmative, please state the time, character and amount of the work done, and the contract price therefor.

ANSWER TO INTERROGATORY No. II. [78]

The Wells Construction Company started the construction of a seven-story concrete building 25 feet in width and 100 feet in length adjoining another building of like size owned by defendant on Lot 12, Block 1104, of the City of Tacoma, during the month of February, 1910. That said building was to be of reinforced concrete, and was to have been completed by said company on or before May 1st, 1910. That the contract price therefor was Thirty-three Thousand (\$33,000.00) Dollars. That during the construction of said building an additional story was added thereto as an extra, at the agreed price of Thirty-five Hundred (\$3,500.00) Dollars. That there were certain other extras consisting of the digging of a concrete sub-basement, and the enlarging of a chimney, and some extra work in a store adjoining, and the furnishing of some extra sash in the halls of the old adjoining building, and extra painting amounting in all to \$1,379.00, making the total contract price for said building, including extras, \$37,879.00.

INTERROGATORY No. III.

What did you ever pay the Wells Construction Company for the work done by them for you?

ANSWER TO INTERROGATORY No. III.

I paid the Wells Construction Company \$35,794.40 in cash, and paid materialmen for material going into the construction of said building under said contract, which material bills said Wells Construction Company were liable for under said contract and agreed to pay, and left unpaid, the sum of \$1677.84, which I paid at the request and instance of the Wells Construction Company.

That in the construction of said building certain deductions were made by defendants, on account of the moneys to become due the Wells Construction Company, as follows:

40 days' labor at cleaning up around building at \$2.50 per day.....	\$ 100.00
Cleaning of floors in third story of the old and new building .....	300.00
2 Doors taken out in the old Kentucky Building .....	100.00
Breaking of skylight in Langlow Building adjoining .....	17.90
Cost of installing switches for lights in Kentucky Building .....	700.00
Wiring floors for bell push buttons .....	200.00
10 fire doors short .....	200.00
	<hr/>
Total,	\$1617.90

[79]

That in addition thereto defendants cancelled a

claim against the Wells Construction Company for demurrage at the rate of Twenty-five Dollars per day, for every day said building remained uncompleted after May 1st, 1910, under the terms of said contract, which claim for demurrage extended from May 1st, 1910, to November 29th, 1910. \* \* \*

INTERROGATORY No. VI.

State when it was the Wells Construction Company constructed a building for you in Tacoma. Give the date they commenced work, and the date of completion of same.

ANSWER TO INTERROGATORY No. VI.

The Wells Construction Company began the construction of a building for defendants in February, 1910, and worked on the same until some time in the month of October, 1910, when defendants were required to complete the building themselves. \* \* \*

INTERROGATORY No. IX.

Is it not true the stock of this corporation was assigned in blank, and turned over to your attorneys?

ANSWER TO INTERROGATORY No. IX.

No, the stock was turned over to Newton H. Peer, and Charles T. Peterson under the following agreement.

In the latter part of November, 1910, defendant Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at Vancouver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near



Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if defendant Peter Sandberg would finance the Company and enable it to complete the contracts he would be thereby able to save himself any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the Corporation, and proposed to defendant Peter Sandberg that they desired him to undertake to finance the corporation and carry out the contracts for the purpose of protecting [80] as far as possible his endorsement on the bonds and notes of the Company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as Trustees, for the use and benefit of said stockholders and not otherwise. That said stock was to be held by said Trustees until such time as defendant Peter Sandberg could make an investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholders should direct. That in accordance therewith defendant Peter Sandberg, immediately caused an investigation and examination of said con-

tracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified said stockholders, whereupon said stockholders directed said Newton H. Peer and Charles T. Peterson as Trustees to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer as said Trustees carried out said directions and instructions, and transferred all of said stock to said Joseph Wells."

**TWENTY-SECOND FINDING:**

That Peter Sandberg took over the building known as the Kentucky Building under the contract, Defendants' Exhibit "A," and finished it himself as Wells Construction Company did not perform its contract for the completion of said building.

**TWENTY-THIRD FINDING:**

That Peter Sandberg has not kept and performed said agreement of indemnity, "Plaintiff's Exhibit 2," or done or performed any of the things required in and by the terms of the application of the indemnity agreement aforesaid.

**TWENTY-FOURTH FINDING:**

That neither Wells Construction Company nor Simon Mettler nor George E. Vergowe nor Joe Wells or any of them have paid or caused to be paid or indemnified or reimbursed plaintiff against the [81] amount of the judgment and the losses accruing upon its said bond as aforesaid.

**TWENTY-FIFTH FINDING:**

That in and by paragraph IX of said application and indemnity agreement hereinbefore referred to and in paragraph VI thereof set out, it was agreed

and provided among other and various things that the order, judgment or adjudication by reason of such suretyship should be *prima facie* evidence of the fact and of the extent of the indemnitor's liability therefor to the surety, and in addition thereto in clause X thereof and as a stipulated condition for the execution of said bond, it was agreed and covenanted that the surety looked to and relied upon the property of said Peter Sandberg and the income and earnings thereof, either present or future, for anything due or to become due the surety under said agreement, and that said suretyship was entered into for the *the* special benefit of Peter Sandberg and the special benefit and protection of Peter Sandberg's property, its income and earnings, he being substantially and beneficially interested in the award and performance of said contract and of the obtaining said suretyship.

**TWENTY-SIXTH FINDING:**

That the plaintiff executed its bond in the sum of twenty-five thousand dollars (\$25,000.00) to Powell River Paper Company, Ltd., conditioned for the indemnifying of that company against any failure on the part of the Wells Construction Company to perform its contract.

**TWENTY-SEVENTH FINDING:**

Plaintiff and defendants have stipulated as to plaintiff's items of expenses incurred in defending the suit of Powell River Paper Company, Ltd., v. American Surety Company, in the Supreme Court of British Columbia, in the [82] amount of fifteen hundred fifty-six and 20/100 dollars (\$1556.20).

**TWENTY-EIGHTH FINDING:**

That the receivership of Wells Construction Company occurred in Tacoma in January, 1911, and in British Columbia some two months later (pp. 27 and 28).

**TWENTY-NINTH FINDING:**

That Peter Sandberg and the community estate managed by him consisting of the Kentucky Building and the land upon which it is situated was debtor to Wells Construction Company October 3, 1910, in the sum of \$36,547.60 (p. 53).

**THIRTIETH FINDING:**

That there was no statement furnished by Sandberg of moneys earned for Kentucky Building construction work under Defendants' Exhibit "A" between Wells Construction Company and Sandberg community until on or about November 29, 1910 (pp. 56 and 57).

**THIRTY-FIRST FINDING:**

That the Wells Construction Company after June, 1910, and to and inclusive of the month of November, 1910, and to and inclusive of the month of November, 1910, was pressed for money and was forced to procure endorsements and security for the conduct of its business and not able to pay its debts (pp. 72, 75, 76, 80, 91, 92, 129, 130, 150, 151).

**THIRTY-SECOND FINDING:**

That before the agreement of November 26, 1910, "Plaintiff's Exhibit 9," was executed, all of the stock of Wells Construction was transferred to Sandberg and manually delivered to Charles T. [83] Peterson and Charles T. Peterson and New-

ton Peer, of the firm of Messrs. Bates, Peer and Peterson, attorneys for both of the defendants, became President and Secretary respectively of Wells Construction Company (pp. 160, 165, 174, 185).

**THIRTY-THIRD FINDING:**

That on the 19th day of October, 1910, Peter Sandberg executed, subscribed and sealed a written document exhibited in this cause upon the trial (p. 168) and contained in evidence herein as "Plaintiff's Exhibit 11."

**THIRTY-FOURTH FINDING:**

That on the 28th day of October, 1910, Wells Construction Company brought and instituted a suit in the Superior Court of the State of Washington against Joseph Wells as evidenced by the complaint received in this cause in evidence as "Plaintiff's Exhibit 12."

**THIRTY-FIFTH FINDING:**

That in respect of the transactions, matters and things hereinbefore found the plaintiff in the making of its defense in the Supreme Court of British Columbia in the Dominion of Canada against Powell River Paper Company, Ltd., as aforesaid, under and pursuant to the terms of Plaintiff's Exhibit 2, laid out and expended the sum of \$1556.20 and that said Peter Sandberg agreed to repay the same under and pursuant to the terms and conditions of said indemnitor's agreement aforesaid and the same has not been repaid either by Sandberg or any one else.

**THIRTY-SIXTH FINDING:**

That the work which the Wells Construction Company in June [84] was doing for Peter Sand-

berg was community work and the building described in Defendant's Exhibit "A" was a community building and consisted of and became community property.

**THIRTY-SEVENTH FINDING:**

That there was a benefit accruing to the community from Sandberg's acts in allowing Wells Construction Company to get the bond of the American Surety Company of New York so that the Wells Construction Company might proceed with its contracts and repay to Sandberg and his wife the moneys advanced between Wells Construction Company and Sandberg and his wife for the construction of the building described in Defendants' Exhibit "A."

AND THE PLAINTIFF NOW REQUESTS THE COURT TO MAKE FROM THE FOREGOING FINDINGS OF FACT THE FOLLOWING.

**Conclusions of Law.**

**FIRST CONCLUSION OF LAW:**

That whatever proceeds were derived from the sale of property through the bankruptcy proceedings of Simon Mettler and through proceedings under the trust in Kentucky Liquor Company and Elmer Hayden, its successor trustee, proportionately reduced the liabilities of Peter Sandberg against and for which liabilities Peter Sandberg took and received the indemnities herein mentioned.

**SECOND CONCLUSION OF LAW:**

That Peter Sandberg, through Kentucky Liquor Company, took and received indemnity against lia-

bility for Wells Construction Company to plaintiff; that Peter Sandberg took and received indemnity from Wells Construction Company and from Simon Mettler and from George Vergowe against liability for Wells Construction Company [85] to plaintiff, and Peter Sandberg took and received indemnity from both said companies for liability to Peter Sandberg and the community estate to plaintiff for the execution of its said bond for Wells Construction Company.

### THIRD CONCLUSION OF LAW:

That Simon Mettler, George Vergowe, Joseph Wells and Wells Construction Company were with Peter Sandberg joint and several obligors and indemnitors to plaintiff under the obligation of June 20, 1910, Plaintiff's Exhibit 2, and became and were bound thereby.

### FOURTH CONCLUSION OF LAW:

That to establish a community debt or obligation it is not essential or necessary that profit or benefit was actually earned or received by the community. It suffices if such profit or benefit might have resulted, and things in this cause as aforesaid found done by Peter Sandberg and between him and Wells Construction Company, Kentucky Liquor Company, Simon Mettler, George Vergowe, Joseph Wells and mutually between themselves and with others in respect of liability to plaintiff herein were designed and intended for the advantage and benefit of the community and to preserve and keep the community personal property of Peter Sandberg and wife from

liabilities to plaintiff herein in those transactions incurred by Peter Sandberg.

#### FIFTH CONCLUSION OF LAW:

That in the matters and things done and transacted aforesaid by Peter Sandberg with the plaintiff herein, the said Peter Sandberg at all times did and transacted said matters and things in [86] the management and control of the community business and in the exercise of his powers as agent of the community estate.

#### SIXTH CONCLUSION OF LAW:

That the obligation or debt of indemnity, Plaintiff's Exhibit 2, was entered into by Peter Sandberg with plaintiff herein in the prosecution of the business, and affairs, and transactions, of the community estate consisting of himself and his wife with Wells Construction Company and was and is a community obligation or debt incurred for the benefit of the community.

#### SEVENTH CONCLUSION OF LAW:

That knowledge of and notice to Peter Sandberg and Messrs. Bates, Peer & Peterson herein was knowledge of and notice to Mathilda Sandberg; and Mathilda Sandberg, as wife of Peter Sandberg, had through them means of notice and knowledge of all the foregoing found facts herein and of all the acts herein found done by Peter Sandberg with plaintiff and others in respect thereto and Mathilda Sandberg, as the wife of Peter Sandberg, is bound thereby and estopped to assert the contrary.

#### EIGHTH CONCLUSION OF LAW:

That Mathilda Sandberg, wife of Peter Sandberg,



in his relations with plaintiff, was put upon inquiry by the accompanying facts and circumstances as heretofore found, and it was her duty to inquire; and she should or ought to have known of and about all the matters and things done and transacted by her husband Peter Sandberg and her attorneys Messrs. Bates, Peer & Peterson in respect thereto; but, whether she prosecuted said inquiry or acted upon said knowledge, Messrs. Bates, Peer & Peterson acted [87] in all the transactions heretofore found as attorneys for both Peter Sandberg and Mathilda Sandberg, his wife, and for the community estate.

#### NINTH CONCLUSION OF LAW:

That the judgment of the Supreme Court of British Columbia of Monday, the 5th day of May, 1913, and formally entered September 20, 1913, in the sum of twenty-five thousand dollars (\$25,000.00) against plaintiff herein in the cause in that said court wherein Powell River Paper Company, Ltd., was plaintiff and Wells Construction Company and American Surety Company of New York, plaintiff herein, were there defendants, is herein evidence conclusive and a bar against both Peter Sandberg and Mathilda Sandberg, his wife.

#### TENTH CONCLUSION OF LAW:

That plaintiff is entitled to have and recover of and from Peter Sandberg and the community estate represented by him and his said wife the said sum of twenty-five thousand dollars (\$25,000.00) and interest thereon at six per cent (6%) per annum from the 20th day of September, 1913, until paid.

## ELEVENTH CONCLUSION OF LAW:

That under the terms and conditions of Plaintiff's Exhibit 2 heretofore mentioned in these findings, there was expended the sum of fifteen hundred fifty-six and 20/100 dollars (\$1556.20) in defense of the liabilities adjudicated against plaintiff by said Supreme Court of British Columbia, and Peter Sandberg thereby agreed as indemnitor to repay the same, but has not done so, nor have the same been paid, and plaintiff is entitled to have and recover of and from Peter Sandberg and the community estate represented [88] by him and his wife the said sum of fifteen hundred fifty-six and 20/100 dollars (\$1556.20) with interest thereon at the rate of six per cent (6%) per annum from September 20, 1913, until paid.

## TWELFTH CONCLUSION OF LAW:

That clause X of the indemnity agreement, plaintiff's exhibit 2, by its terms precludes and estops Peter Sandberg and his wife Mathilda Sandberg from disputing or showing that the community estate, its rents, issues, profits or incomes, was or is not bound to plaintiff herein; and the terms and conditions of said clause X are conclusive and binding upon the defendants and their estate, real, personal and mixed, for plaintiff in faith thereof executed its bond and sustained the liabilities determined herein.

## THIRTEENTH CONCLUSION OF LAW:

In view of all the circumstances, the business relations and operations of Sandberg in this whole matter were so dependent upon, interrelated and associated with Wells Construction Company affairs

and the affairs of the community and the doings and transactions of Sandberg with the plaintiff so involved with these relations and operations that it cannot be said that Sandberg was a mere accommodation maker or surety for Wells Construction Company. What was done by Sandberg was therefore in furtherance of the supposed business interests of the community and the liability thereon is that of the community.

All of which is found and concluded this — day of September, 1915, in our said court at Tacoma.

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District Judge. [89]

And plaintiff prays that the Court may grant its requests for findings of fact and conclusions of law as aforesaid, accordingly.

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W. C. BRISTOL,  
Attorneys for Plaintiff.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 21, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [90]

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**Order Denying Plaintiff's Requests for Findings of Fact and Conclusions of Law.**

IT IS HEREBY ORDERED that plaintiff's requests for Findings of Fact numbered I, VI, VII, VIII, IX, X, XI, XII, XVII, XXIII, XXIV, XXV, XXVI, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXIV, and XXXVII, and plaintiff's

requests for Conclusions of Law numbered I, II, III, IV, V, VI, VII, VIII, IX and XII, and each of them be, and the same are hereby denied.

IT IS FURTHER ORDERED that defendants' requests for Findings of Fact numbered II, V, VI, VII, VIII and XIII, and defendants' request for Conclusions of Law numbered I, and each of them be, and the same are hereby denied.

ORDERED this 22d day of October, 1915.

EDWARD E. CUSHMAN,  
Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [91]

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**Defendants' Requested Findings of Fact and  
Conclusions of Law.**

Comes now defendant Mathilda Sandberg separately and in her own behalf, and the defendants Peter Sandberg and Mathilda Sandberg, his wife, as a community, and request the Court to make the following Findings of Fact and Conclusions of Law herein.

**FINDINGS OF FACT.**

**I.**

That on or about the 20th day of June, 1910, the defendant Peter Sandberg subscribed and acknowledged that certain application or indemnity agreement bearing date on that date to plaintiff, which said application or indemnity agreement was intro-

duced in evidence herein and marked "Plaintiff's Exhibit No. 2."

That defendant Mathilda Sandberg had no knowledge of the subscribing and acknowledgment of said agreement by defendant Peter Sandberg until the institution of this action in this Court, to wit, on or about the 26th day of June, 1914.

## II.

That said application or indemnity agreement so signed and acknowledged by defendant Peter Sandberg, contained among other provisions the following:

"IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary), expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be [92] required to pay the same."

"VI. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety to prosecute or defend or take part

in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety's intent so to do, or on making such request, place the Surety in possession of funds or securities approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding from the State Court to the Federal Court, in any State where such action would in any way affect the Surety's license or right to transact business.

“IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication by reason of such suretyship, shall be *prima facie* evidence of the fact and of the extent of the indemnitor's liability therefor to the Surety.”

“X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which

the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and beneficially interested in the award and performance of such contract and obtaining such suretyship."

### III.

That defendants Peter Sandberg and Mathilda Sandberg were married at Tacoma, Washington, in November, 1894, and ever since said time have been and now are husband and wife, and during all of said time have lived together as such, and said defendants are the owners of certain real property in the Counties of Pierce and King, in the State of Washington, more particularly described, as follows:

Lots 13 and 14, in Block 1104; Lots 10, 11 and 12, in Block 1403; Lots 7 and 8, in Block 1101; and Lots 11 and 12, in Block 1303, in the City of Tacoma, as the same are designated upon a certain map entitled, "Map of New Tacoma, Washington Territory," which map was filed for record in the office of the County Auditor of said County, February 3, 1875.

[93]

Beginning at the intersection of the North line of Lower Eleventh Street South with the East line of the City Waterway, as shown on the Supplemental Plat of Tacoma Tide Lands; thence Easterly along

the North line of Lower 11th Street 393.206 feet; thence Northerly along a line making an angle of 73 degrees, 50 minutes 02 seconds with the last described course 184.181 feet; thence Westerly along a line at right angles to the line last described 356.033 feet to the Eastern line of the City Waterway 77.77 feet to the point of beginning. Also commencing at the intersection of the North line of Lower South 11th Street with the East line of City Waterway above described; thence Easterly along the North line of Lower South 11th Street 476.499 feet, to the place of beginning of the tract herein described; thence Northerly along a line making an angle of 73 degrees 50 minutes 02 seconds with the last described course 173.510 feet; thence Southerly along a line at right angles to the last described course 302.416 feet to the North line of Lower South 11th Street; thence Westerly along said North line of Lower South 11th Street 175.133 feet to the place of beginning.

Lots 1, 2, 3 and 4, Block 1112, Tacoma Land Company's Addition;

Lots 11 and 12, Block 7638, Tacoma Land Company's Seventh Addition;

Lot 1, Block 61, Balch's Addition to Steilacoom, Pierce County, Washington;

West  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  less  $1\frac{38}{100}$  acres, and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  Section 8, Township 8, Range 5 East, Pierce County.

West half of Section 2, Township 20, Range 7 King County, Washington.

North  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  of Section 12, Township 20,



Range 7, and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , Section 12, Township 20, Range 7, King County, Washington.

Southwest quarter of Section 6, Township 20, Range 8, King County, Washington;

East  $\frac{1}{2}$  of Southeast  $\frac{1}{4}$ , Section 10, Township 20, Range 8, King County, Washington.

All of which said property was acquired by defendants after their marriage, and by their joint efforts, and not by gift, bequest or inheritance.

#### IV.

That at the time of their marriage defendant Peter Sandberg had no property, except a small house on a lot situated at about South 25th and I Streets, in the city of Tacoma, which house [94] and lot were worth not to exceed one thousand dollars, and were incumbered by a mortgage of six hundred dollars. That said house, after the marriage of said defendants, was sold, and the funds derived from such sale were used and expended by defendant Peter Sandberg without any separate account of the same being kept.

#### V.

That on or about the 24th day of June, 1910, in pursuance of said application, or indemnity agreement "Plaintiff's Exhibit No. 2," hereinabove referred to, plaintiff made, executed and delivered its certain bond with the Wells Construction Company, a corporation, as principal, and itself as surety, to Powell River Paper Company, Ltd., of Vancouver, B. C., which said bond was in the penal sum of twenty-five thousand dollars, a copy of the same

being received in evidence herein and marked, "Plaintiff's Exhibit No. 3."

## VI.

That on or about the 27th day of April, 1911, the Powell River Paper Company, Ltd., in the Supreme Court of British Columbia issued its writ and brought a suit against the Wells Construction Company and against plaintiff American Surety Company, and on the 17th day of May, 1911, there was served upon defendant Peter Sandberg at his place of business, 1128 Pacific Avenue, Tacoma, Washington, a notice of said suit or action so brought by said Powell River Paper Company, Ltd., which notice, together with a proof of service thereon was introduced in evidence herein marked "Plaintiff's Exhibit No. 4." That defendant Mathilda Sandberg had no knowledge or notice thereof, or of the pendency of said action, and defendant Peter Sandberg did not appear or defend the same.

That thereafter such proceedings were had in the Supreme Court of British Columbia that on the 5th day of May, 1913, there was rendered and given a judgment in said cause against Wells [95] Construction Company for thirty-one thousand six hundred and thirty-two and 94/100 (\$31,632.94) dollars, and against the American Surety Company, plaintiff, for the amount of its said bond, to wit, the sum of twenty-five thousand (\$25,000) dollars.

## VII.

That plaintiff incurred certain items of expense in defending said suit stipulated by plaintiff and defendants herein to be the sum of fifteen hundred and

fifty-six and 20/100 (\$1556.20) dollars.

VIII.

That neither of the defendants Peter Sandberg or Mathilda Sandberg, his wife, were ever stockholders of the Wells Construction Company, and neither of said defendants had any financial interest in the Wells Construction Company, and that defendant Peter Sandberg signed the application or indemnity agreement, Plaintiff's Exhibit No. 2, at the request of and for the accommodation and use of Simon Mettler, who was a large stockholder and officer of the Wells Construction Company, and an old friend of defendant Peter Sandberg, and that there was no agreement or understanding whatsoever that said defendants, or either of them, should receive anything for said Peter Sandberg signing said application.

That at the time defendant Peter Sandberg signed said application the Wells Construction Company was constructing a building for defendants, the contract price for which building, together with extras was thirty-six thousand five hundred dollars, on which the defendants had prior to June 20th, 1910, paid the sum of thirty-six thousand three hundred eighty-three and 05/100 (\$36,383.05) dollars. That at said time said building was practically completed, and that said payments so made by defendants were entirely in cash, paid on checks drawn by defendant Peter Sandberg, and that there was no connection whatsoever in the relationship of defendants and Wells Construction Company, in the matter of the [96] construction of said building and the signing

of said indemnity agreement, "Plaintiff's Exhibit No. 2."

That at said time the Wells Construction Company was in good and substantial beneficial condition, able to complete and perform said building contract for defendants, and to carry on its business in the ordinary course.

#### IX.

That on June 20th, 1910, the Wells Construction Company, Simon Mettler, and George Vergowe, executed to defendant Peter Sandberg an indemnity agreement introduced in evidence herein as Plaintiff's "Exhibit No. 10." That on November 26th, 1910, the Kentucky Liquor Company, the Wells Construction Company, Simon Mettler and George Vergowe, made and entered into an agreement introduced in evidence herein, marked "Plaintiff's Exhibit No. —," which said agreements were made with defendant Peter Sandberg without the knowledge, consent or acquiescence of his wife Mathilda Sandberg, for the purpose of saving defendant Peter Sandberg harmless on account of liability he had incurred on account of the Wells Construction Company, because of the matters and things referred to in said agreements, but that said agreements, or either of them, were not for the benefit, or gain, or in the interest of the community consisting of defendants, or for the use, benefit or interest of the defendant Mathilda Sandberg.

#### X.

That since the filing of the opinion herein by the Court, the plaintiff has moved to reopen the cause for

the purpose of submitting a proper exemplification of the record of the judgment of the Courts of British Columbia referred to in the Court's opinion in accordance therewith, and has supplied the record with an authenticated copy, which defendants concede to be in compliance with the law. [97]

## XI.

That in the latter part of November, 1910, defendant Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at Vancouver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if defendant Peter Sandberg would finance the company and enable it to complete the contracts he would be thereby able to save himself any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the corporation, and proposed to defendant Peter Sandberg that they desired him to undertake to finance the corporation and carry out the contracts for the purpose of protecting as far as possible his endorsement on the bonds and notes of the company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that *that*

the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as trustees, for the use and benefit of said stockholders and not otherwise. That said stock was to be held by said trustees until such time as defendant Peter Sandberg could make an investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholders should direct. That in accordance therewith defendant Peter Sandberg, immediately caused an investigation and examination [98] of said contracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified said stockholders, whereupon said stockholders directed said Newton H. Peer, and Charles T. Peterson as trustees to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer as said trustees carried out said directions and instructions, and transferred all of said stock to said Joseph Wells.

## XII.

That defendant Peter Sandberg has not kept and performed the agreement of indemnity, "Plaintiff's Exhibit No. 2," nor any of the things required by the terms and conditions thereof, and that the Wells Construction Company, nor Simon Mettler, nor George E. Vergowe, nor Joseph Wells, or any of them have paid, or caused to be paid, or indemnified or reim-

bursed plaintiff against the amount of the judgment and the losses accruing on said bond.

XIII.

That the Wells Construction Company became insolvent and went into the hands of a receiver in January, 1911.

XIV.

That defendant Peter Sandberg without the knowledge, consent or acquiescence of Mathilda Sandberg, from time to time signed certain notes and guaranties to banks in British Columbia, referred to in the testimony herein, in addition to the indemnity agreement to plaintiff sued on herein, which said notes and guaranties so signed by defendant Peter Sandberg were for the use and accommodation of the Wells Construction Company, Simon Mettler, George Vergowe and Joseph Wells. That in signing and executing said notes and guaranties, and in signing and entering into the several agreements referred to in the testimony herein, excepting, however, the building contract of the Kentucky Building, and in all of his acts and doings in connection with said notes, guaranties and other agreements, excepting said [99] contract for the Kentucky Building, and in the conveying of the property in trust by Peter Sandberg to the Kentucky Liquor Company, and to Elmer M. Hayden, and the bringing of the foreclosure suit by said Elmer M. Hayden, and the selling of said property, and in the bringing of said action by Peter Sandberg in the Superior Court of Pierce County, against Carl Mettler and wife, and Simon Mettler and wife, referred to in the testimony, and in the

transaction concerning the taking of the capital stock of the Wells Construction Company by Peer and Peterson, as trustees, and all acts and things that defendant Peter Sandberg may have done in that respect, and with respect to the Wells Construction Company, Simon Mettler, Joseph Wells, George Vergowe, Elmer M. Hayden, as trustee, the Kentucky Liquor Co., the Molsons Bank, and the Bank of Vancouver, and with plaintiff herein, as referred to in the testimony, with the exception of said building contract for the Kentucky Building, were all matters and things that did not affect or concern the community of defendants, or the defendant Mathilda Sandberg, and were for the sole use, benefit and accommodation of third persons, and were not for the use, benefit, profit or advantage of defendant Peter Sandberg, or of the community consisting of himself and Mathilda Sandberg, his wife, or either of them, nor in the carrying on of the business of himself or wife, or of their community, or of either of them. That the contract regarding the construction of the Kentucky Liquor Company building entered into by the defendant Peter Sandberg with the Wells Construction Co., was made and practically carried out and completed prior to the time that defendant Peter Sandberg executed the indemnity agreement sued on herein, "Plaintiff's Exhibit No. 2," and that said building contract, and the relationship of the parties thereto was entirely disconnected with any of the other dealings of defendant Peter Sandberg with the Wells Construction Company and the persons and corporations above referred to, and was en-



tirely independent thereof, and was not spoken [100] of or considered by any of the parties in connection with any of the other transactions above referred to, and was entirely independent thereof, and anything done by either of, or any of the parties regarding the Kentucky Building contract was not a consideration, and was not regarded as a consideration for any of the agreements, endorsements, acts or things done by defendant Peter Sandberg above referred to.

From the foregoing Findings of Fact, the Court makes the following.

### CONCLUSIONS OF LAW.

#### I.

That plaintiff is entitled to a judgment against defendant Peter Sandberg in the sum of twenty-six thousand five hundred and fifty-six and 20/100 dollars, (\$26,556.20) *dollars*, together with interest thereon at the rate of 6% per annum, from the 20th day of September, 1915.

#### II.

That plaintiff's action should be dismissed as to defendant Mathilda Sandberg.

#### III.

That said judgment should provide that it is a separate debt of defendant Peter Sandberg, and not a debt, liability or obligation of defendant Mathilda Sandberg, or of the community consisting of Peter Sandberg and Mathilda Sandberg, his wife, and that the same should provide that it is not, and does not constitute a lien or a cloud on the title of the real

property of defendants hereinabove specifically set forth.

Let a judgment be entered accordingly.

By the Court,

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Judge. [101]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 11, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [102]

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**Findings of Fact and Conclusions of Law.**

The Court makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT.**

**I.**

That on or about the 20th day of June, 1910, the defendant Peter Sandberg subscribed and acknowledged that certain application or indemnity agreement bearing date on that date to plaintiff, which said application or indemnity agreement was introduced in evidence herein and marked "Plaintiff's Exhibit No. 2."

**II.**

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the Surety harmless from

and against every claim, demand, liability, cost, charge, counsel fee, (including fees of special counsel whenever by the Surety deemed necessary), expense, suit order, judgment and adjudication whatsoever, and will place the Surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same.”

III.

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

“VI. That in the event of the Surety deeming it advisable, or of the indemnitor requesting the Surety to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the Surety’s intent so to do, or on making such request, place the Surety in possession of funds or securities, approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom or from its said suretyship. [103] The indemnitor will not ask or require the Surety to remove, or join in any application for the removal of any action or proceeding from the State Court to the Federal Court, in any State where such action would in any way affect the

surety's license or right to transact business."

## IV.

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"IX. That should any claim or demand be made upon the Surety by reason of such suretyship, the Surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication by reason of such suretyship, shall be *prima facie* evidence of the fact and of the extent of the indemnitor's liability therefor to the Surety."

## V.

That said application and indemnity agreement so signed by Peter Sandberg contained, among other provisions, the following:

"X. That the Surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substan-

tially and beneficially interested in the award and performance of such contract and obtaining such suretyship.”

VI.

That defendant Mathilda Sandberg had no knowledge of the subscribing and acknowledgment of said agreement by defendant Peter Sandberg until the institution of this action in this court, to wit, on or about the 26th day of June, 1914.

VII.

That defendants Peter Sandberg and Mathilda Sandberg were married at Tacoma, Washington, in November, 1894, and ever since said time have been and now are husband and wife, and during all of said time have lived together as such, and said defendants are the [104] owners of certain real property in the Counties of Pierce and King, in the State of Washington, more particularly described as follows:

Lots 13 and 14, in Block 1104; Lots 10, 11 and 12, in Block 1403; Lots 7 and 8 in Block 1101; and Lots 11 and 12, in Block 1303, in the City of Tacoma, as the same are designated upon a certain map entitled, “Map of New Tacoma Washington Territory,” which map was filed for record in the office of the County Auditor of said County, February 3, 1875.

Beginning at the intersection of the North line of Lower Eleventh Street South with the East line of the City Waterway, as shown on the Supplemental Plat of Tacoma Tide Lands; thence Easterly along the North Line of Lower 11th Street 393.206 feet; thence Northerly along a line making an angle of 73

degrees, 50 minutes 02 seconds with the last-described course 184.181 feet; thence Westerly along a line at right angles to the line last described 356.033 feet to the Eastern line of the City Waterway 77.77 feet to the point of beginning. Also commencing at the intersection of the North line of Lower South 11th Street with the East line of City Waterway above described; thence Easterly along the North line of Lower South 11th Street 476.499 feet, to the place of beginning of the tract herein described; thence Northerly along a line making an angle of 73 degrees 50 minutes, 02 seconds with the last-described course 173.510 feet; thence Southerly along a line at right angles with the last-described course 302.416 feet to the North line of Lower South 11th Street; thence Westerly along said North line of Lower South 11th Street 175.133 feet to the place of beginning.

Lots 1, 2, 3 and 4, Block 1112 Tacoma Land Company's Addition;

Lots 11 and 12 Block 7638 Tacoma Land Company's Seventh Addition;

Lot 1, Block 61, Balch's Addition to Steilacoom, Pierce County, Washington;

West  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  less 1-38/100 acres and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , Section 8, Township 8, Range 5 East, Pierce County;

West half of Section 2, Township 20, Range 7, King County, Washington;

North  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  of Section 12, Township 20, Range 7, and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , Section 12, Township 20, Range 7, King County, Washington;

Southwest quarter of Section 6, Township 20, Range 8, King County, Washington;

East  $\frac{1}{2}$  of Southeast  $\frac{1}{4}$ , Section 10, Township 20, Range 8, King County, Washington. [105]

All of which said property was acquired by defendants after their marriage, and by their joint efforts, and not by gift, bequest or inheritance.

#### VIII.

That at the time of their marriage defendant Peter Sandberg had no property, except a small house on a lot situated at about South 25th and I Streets, in the city of *of* Tacoma, which house and lot were worth not to exceed one thousand dollars, and were incumbered by a mortgage of six hundred dollars. That said house, after the marriage of said defendants, was sold, and the funds derived from such sale were used and expended by defendant Peter Sandberg without any separate account of the same being kept.

#### IX.

That on or about the 27th day of April, 1911, the Powell River Paper Company, Ltd., in the Supreme Court of British Columbia issued its writ and brought a suit against the Wells Construction Company and against plaintiff American Surety Company, and on the 17th day of May, 1911, there was served upon defendant Peter Sandberg at his place of business, 1128 Pacific Avenue, Tacoma, Washington, a notice of said suit or action so brought by said Powell River Paper Company, Ltd., which notice, together with a proof of service thereon was introduced in evidence herein, marked "Plaintiff's Exhibit No. 4." That defendant Mathilda Sandberg

had no knowledge or notice thereof, or of the pendency of said action, and defendant Peter Sandberg did not appear or defend the same.

That thereafter such proceedings were had in the Supreme Court of British Columbia that on the 5th day of May, 1913, there was rendered and given a judgment in said cause against Wells Construction Company for thirty-one thousand, six hundred and thirty-two and 94/100 dollars (\$31,632.94) *dollars*, and against the American [106] Surety Company, plaintiff, for the amount of its said bond, to wit, the sum of twenty-five thousand dollars (\$25,000).

#### X.

That since the filing of the opinion herein by the Court, the plaintiff has moved to reopen the cause for the purpose of submitting a proper exemplification of the record of the judgment of the Courts of British Columbia referred to in the Court's opinion in accordance therewith, and has supplied the record with an authenticated copy, which defendants concede to be in compliance with the law.

#### XI.

That on June 20, 1910, when the contract of indemnity, "Plaintiff's Exhibit 2," was signed by Peter Sandberg, the Wells Construction Company was then constructing a building for Peter Sandberg and Mathilda Sandberg, his wife,—carrying on a business as the "Kentucky Liquor Company"—under and pursuant to the terms of a contract designated herein Defendants' Exhibit "A," and that at said time, June 20, 1910, said building was not completed.



XII.

That neither of the defendants, Peter Sandberg or Mathilda Sandberg, his wife, were ever stockholders of the Wells Construction Company, and neither of said defendants had any financial interest in the Wells Construction Company, and that defendant Peter Sandberg signed the application or indemnity agreement, Plaintiff's Exhibit No. 2, at the request of, and for the accommodation and use of Simon Mettler, who was a large stockholder and officer of the Wells Construction Company, and an old friend of defendant Peter Sandberg, and that there was no agreement or understanding whatsoever that said defendants, or either of them, should receive anything for said Peter Sandberg signing said application.

That, at the time defendant Peter Sandberg signed said application, the Wells Construction Company was constructing the [107] building mentioned in the preceding finding, for defendants, the contract price for which building, together with extras, was thirty-six thousand, five hundred dollars, on which the defendants had, prior to June 20, 1910, paid the sum of thirty-six thousand, three hundred, eighty-three and 05/100 dollars (\$36,383.05). That at said time said building was practically completed, and that said payments so made by defendants were entirely in cash, paid on checks drawn by defendant Peter Sandberg, and that there was no connection whatsoever in the relationship of defendants and Wells Construction Company, in the matter of the construction of said building and the signing of said

indemnity agreement, "Plaintiff's Exhibit No. 2."

That at said time the Wells Construction Company was in good and substantial financial condition, able to complete and perform said building contract for defendants, and to carry on its business in the ordinary course.

XIII.

That on June 20, 1910, Wells Construction Company, together with Simon Mettler and George Vergowe executed to Peter Sandberg an indemnity agreement to save and keep harmless the defendants from any liability under "Plaintiff's Exhibit 2," and said agreement was introduced and received in evidence herein as "Plaintiff's Exhibit 10."

XIV.

That on the 3d day of October, 1910, Wells Construction Company rendered and made its statement of account to Sandberg claiming a balance of thirty-five thousand dollars (\$35,000) then due.

XV.

That on November 26, 1910, Kentucky Liquor Company with Wells Construction Company, Simon Mettler and George Vergowe made and entered into an agreement in writing as introduced in evidence herein in words and figures as follows, to wit: [108]

"THIS AGREEMENT, Made and entered into this 26th day of November, A. D. 1910, between THE KENTUCKY LIQUOR COMPANY, a Washington corporation, THE WELLS CONSTRUCTION COMPANY, a Washington corporation, GEORGE VERGOWE and CARRIE VERGOWE, his wife,

parties of the first part, and SIMON METTLER, party of the second part,

“WITNESSETH: Whereas the Wells Construction Company has heretofore conveyed by deed of conveyance to the Kentucky Liquor Company, a corporation, as trustee for Peter Sandberg and the Bank of Vancouver, a British Columbia corporation, and the Molsons Bank, a British Columbia corporation both of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to wit:

“Dia. Twelve (12), Lot Fifteen (15), Section Eleven (11), Township Twenty (20), Range Three (3) East; Lots Five (5) to Fourteen (14), Block 8858, Indian Addition; Lots Eighteen (18) and Nineteen (19), Block 8050, Indian Addition; Lots Nine (9) to Twenty-six (26), Block 8150 Indian Addition; Lots Nineteen (19) to Twenty-six, Block 8249, Indian Addition; North  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , Section 14, Township 20, Range 3 E.

“And whereas George Vergowe and Carrie Vergowe, his wife, have heretofore transferred and conveyed by deeds of conveyance to Kentucky Liquor Company, a Washington corporation, as trustee for Peter Sandberg and the Bank of Vancouver, a British Columbia corporation, of Vancouver, B. C., and the Molsons Bank, a British Columbia corporation of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to wit:

“The North Thirty (30) acres of the Northwest quarter of the Northwest quarter of Section Thirteen

(13), Township Twenty (20), Range Three (3) East; also the Northwest Quarter of the Southwest quarter of the Northwest quarter of the same section, township and range.

—which said conveyances by said Wells Construction Company and George Vergowe and Carrie Vergowe, his wife, of said real property above described was made for the purposes and given as collateral security for the payment of certain indebtedness of the Wells Construction Company, to wit:

“A note for the sum of Twenty-five Thousand (\$25,000) Dollars, made by the Wells Construction Company to said Bank of Vancouver dated at Vancouver, B. C., ———, 1910, due ninety days after date;

“A note for Fifty-five Thousand (\$55,000) Dollars, made by the Wells Construction Company to the said Molsons Bank, a corporation, dated at Vancouver, B. C. ———, 1910, and further to indemnify and save harmless said Peter Sandberg against liability as endorser of said notes of said Bank of Vancouver and said The Molsons Bank, a corporation, and further to indemnify said Peter Sandberg against liability as surety on said contract bonds of said Wells Construction Company, as follows: [109]

“One to the Powell River Paper Company, Ltd., in the principal sum of Twenty-five Thousand (\$25,000) Dollars; One to the Metropolitan Building Company, Ltd., in the principal sum of Twenty-seven Thousand (\$27,000) Dollars; One to the City of Vancouver in the principal sum of Ten Thousand Dollars (\$10,000); One to the Pacific Investment

Company, Ltd., in the principal sum of Three Thousand (\$3,000) Dollars;

“And whereas Simon Mettler, above named, is the holder of demand promissory notes of the said Wells Construction Company amounting to Seventy-nine Thousand, Five Hundred Dollars (\$79,500), besides interest.

“And whereas said Mettler is the holder of one share of the capital stock of said Wells Construction Company, a corporation;

“And whereas said Wells Construction Company has expended and invested large sums of money in the performance of certain contracts entered into by it with said Powell River Paper Company, Ltd., Metropolitan Building Company, Ltd., City of Vancouver, a municipal corporation, and Pacific Investment Company, Ltd., and numerous other persons, which it is necessary to carry to completion to save said Wells Construction Company from becoming insolvent,

“And Whereas, said Simon Mettler is desirous of withdrawing from said corporation and relieving the same from liability on account of the indebtedness owing him, from said corporation in consideration of said corporation carrying on its said business and paying off and discharging its creditors whose claims and accounts said Peter Sandberg has become surety for.

“IT IS NOW THEREFORE AGREED, between said parties, that the Kentucky Liquor Company, a corporation, trustee as aforesaid, will hold the title

to the lands and premises hereinbefore described for the purposes hereinbefore referred to until such time as it shall be necessary to apply and exhaust the same for the purposes for which it was conveyed as hereinbefore set forth.

“That the Wells Construction Company will apply and exhaust all of its property and assets in payment and discharge of its said obligations on which said Peter Sandberg is endorser, or has become liable in any manner whatever, and that thereafter said Kentucky Liquor Company, trustee, shall apply by conversion, or otherwise, as much of said property above described as may be necessary to satisfy and discharge the balance, if any, of said claims on which said Peter Sandberg may in any manner be liable, and the surplus, if any, of said property remaining in the hands of said Kentucky Liquor Company, trustee, after fully paying and discharging all of said claims and demands of said Bank of Vancouver and the Molsons Bank and Peter Sandberg shall be conveyed by proper deeds of conveyance to Simon Mettler.

“IN WITNESS WHEREOF, The Wells Construction Company, a [110] corporation, and the Kentucky Liquor Company, a corporation, have by resolutions of their respective Board of Directors, duly asked and recorded, authorized their President and Secretary, respectively, to execute these presents and attach the corporate seals of said corporations, respectively, hereto.

“IN WITNESS WHEREOF, said parties have hereunto set their hands and seals at Tacoma, Wash-

ington, this 26th day of November, A. D. 1910.

“KENTUCKY LIQUOR COMPANY, a Corporation,

By (PETER SANDBERG),

Its President.

Attest (P. H. LUCK),

Secretary.

WELLS CONSTRUCTION COMPANY, a Corporation,

By (CHARLES T. PETERSON),

Its President.

Attest (NEWTON H. PEER),

Secretary.

(GEORGE E. VERGOWE).

(SIMON METTLER.)”

XVI.

That on November 29, 1910, Peter Sandberg rendered and made a statement of his account to Wells Construction Company therein claiming upwards of three thousand dollars due the community from said Wells Construction Company.

XVII.

That Peter Sandberg paid direct certain materialmen furnishing supplies and laborers performing work, to wit, Tacoma Mill Company, to wit, one named Grosser, to wit one named Olaf Halstead, for material and labor in the construction of the Kentucky Liquor Company building pursuant to Defendant's Exhibit “A” entered into with Wells Construction Company.

XVIII.

That Peter Sandberg took over the building known

as the [111] Kentucky Building under the contract Defendants' Exhibit "A," and finished it himself as Wells Construction Company did not perform its contract for the completion of said building.

## XIX.

That the work which the Wells Construction Company was doing in June for Peter Sandberg was community work and the building described in Defendants' Exhibit "A" was a community building and consisted of and became community property.

## XX.

That on February 20, 1911, in cause 30878 in the Superior Court of the State of Washington, Peter Sandberg swore to and filed a complaint wherein Peter Sandberg was plaintiff and Simon Mettler, Anna Mettler and Carl Mettler, were defendants and the same is in evidence in this cause as "Plaintiff's Exhibit 7" and therein and therefrom it appears that Peter Sandberg alleged and stated in respect of the transactions concerned in this case:

"III. That on or about said last date above referred to, to wit, the —— day of August, A. D. 1910, the defendants Simon Mettler and Anna Mettler, his wife, and said George E. Vergowe and his wife and said Joe Wells and his wife, and the Wells Construction Company, a corporation, entered into an oral agreement with plaintiff, wherein and whereby in consideration of plaintiff's endorsing certain notes, bonds and guarantees, hereinafter particularly referred to, to enable said Wells Construction Company, a corporation in which said persons were inter-



ested as stockholders, to get credit with which to raise money to carry on its said business of contracting and constructing buildings and improvements, for which said Wells Construction Company then held contracts, it was agreed that they, said Vergowe and wife, and said Wells and wife, Simon Mettler and Anna Mettler, his wife, and Wells Construction Company, a corporation, would convey by deeds of conveyance certain real property in Pierce County, Washington, held and owned by them to fully secure and indemnify plaintiff on account of his endorsements of said notes, bonds, guarantees and other commercial paper to enable said Wells Construction Company to obtain credit and money to carry on said business. \* \* \*

“IV. That pursuant to said agreement so entered into, plaintiff on or about the —— day of August, 1910, went with the defendant Simon Mettler to the City of Vancouver, in the Province of British Columbia, where said Wells Construction Company, a corporation, was operating, and at said defendant’s [112] request, and in accordance with said agreement hereinabove referred to, endorsed certain promissory notes and a guarantee in writing to The Bank of Vancouver, of Vancouver, B. C., to the amount of Twenty-five Thousand (\$25,000) Dollars, and plaintiff pursuant to said agreement so made with said defendants endorsed as a surety an indemnity bond to the American Surety Company in the sum of Ten Thousand (\$10,000) Dol-

lars, to enable said defendants and said Wells Construction Company to enter into a contract with the said City of Vancouver, B. C., for the construction of a certain reservoir, and at the same time endorsed and signed an indemnity bond to said American Surety Company in the sum of Twenty-five Thousand (\$25,000) Dollars to enable said defendants and said Wells Construction Company to enter into a certain contract with one Powell River Paper Company, a corporation; that said notes and said guarantee are long past due and unpaid, and said contracts with said City of Vancouver and said Powell River Paper Company, are yet uncompleted and plaintiff is as yet unrelieved from the liability on account of said notes, guarantee and indemnity bonds. \* \* \*

“XII. That the liability of plaintiff on account of the bonds, notes and guarantees executed by him pursuant to said agreement with the defendants Simon Mettler and Anna Mettler, his wife, hereinbefore set forth, has not as yet, and cannot for sometime in the future be fully ascertained and fixed, but plaintiff alleges the fact to be that the same will probably exceed Thirty Thousand (\$30,000) Dollars, over and above the securities and indemnity already held by plaintiff.”

### XXI.

That on the 26th day of May, 1914, in cause No. 35986 in the Superior Court of the State of Washington, in and for Pierce County, wherein the Molsons

Bank, a corporation organized and existing under the laws of Canada, duly chartered under the laws of Canada, was plaintiff and Peter Sandberg and Mathilda Sandberg, his wife, were defendants, the defendants Peter Sandberg and Mathilda Sandberg, through and by their attorneys, Messrs. Bates, Peer & Peterson, in said court in said cause, in answer to interrogatories propounded to them, filed and made answer to said interrogatories as introduced in evidence in this cause as "Plaintiff's Exhibit No. 8" as follows, to wit:

"INTERROGATORY No. I.

"Did the Wells Construction Company do any work for you or either of you, at any time before the execution of the note sued on in this case? [113]

"ANSWER TO INTERROGATORY No. I.

"Yes.

"INTERROGATORY No. II.

"If you answer the preceding interrogatory in the affirmative, please state the time, character and amount of the work done, and the contract price therefor.

"ANSWER TO INTERROGATORY No. II.

"The Wells Construction Company started the construction of a seven story concrete building 25 feet in width and 100 feet in length adjoining another building of like size owned by defendant on Lot 12, Block 1104, of the City of Tacoma, during the month of February, 1910. That said building was to be of reinforced concrete, and was to have been completed by said company on or before May 1st, 1910. That the contract price therefor was Thirty-three Thou-

sand (\$33,000) Dollars. That during the construction of said building an additional story was added thereto as an extra, at the agreed price of Thirty-Five Hundred (\$3500) Dollars. That there were certain other extras consisting of the digging of a concrete sub-basement, and the enlarging of a chimney, and some extra work in a store adjoining, and the furnishing of some extra sash in the halls of the old adjoining building, and extra painting amounting in all to \$1379, making the total contract price for said building, including extras \$37,879.00.

“INTERROGATORY No. III.

“What did you ever<sup>y</sup> pay the Wells Construction Company for the work done by them for you?

“ANSWER TO INTERROGATORY No. III.

“I paid the Wells Construction Company \$35,794.40 in cash, and paid material-men for material going into the construction of said building under said contract, which material bills said Wells Construction Company were liable for under said contract and agreed to pay, and left unpaid, the sum of \$1677.84, which I paid at the request and instance of the Wells Construction Company.

“That in the construction of said building certain deductions were made by defendants, on account of the moneys to become due the Wells Construction Company, as follows:

40 days labor at cleaning up around	
building, at \$2.50 per day . . . . .	\$100.00
Cleaning of floors in third story of	
the old and new building . . . . .	300.00

2 Doors taken out in the old Kentucky Building . . . . .	100.00
Breaking of skylight in Langlow Building adjoining . . . . .	17.90
Cost of installing switches for lights in Kentucky Building. . . . .	700.00

[114]

Wiring floors for bell push-buttons	200.00
10 fire doors short . . . . .	200.00

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Total, \$1,617.90

“That in addition thereto defendants cancelled a claim against the Wells Construction Company for demurrage at the rate of Twenty-five Dollars per day, for every day said building remained uncompleted after May 1st, 1910, under the terms of said contract, which claim for demurrage extended from May 1st, 1910, to November 29th, 1910. \* \* \*

“INTERROGATORY No. VI.

“State when it was the Wells Construction Company constructed a building for you in Tacoma. Give the date they commenced the work and the date of the completion of same.

“ANSWER TO INTERROGATORY No. VI.

“The Wells Construction Company began the construction of a building for defendants in February, 1910, and worked on the same until some time in the month of October, 1910, when defendants were required to complete the building themselves. \* \* \*

“INTERROGATORY No. IX.

“Is it not true the stock of this corporation was assigned in blank, and turned over to your attorneys?

## "ANSWER TO INTERROGATORY No. IX.

"No, the stock was turned over to Newton H. Peer and Charles T. Peterson under the following agreement:

"In the latter part of November, 1910, defendant Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at Vancouver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if defendant Peter Sandberg would finance the company and enable it to complete the contracts he would be thereby able to save himself any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the Corporation, and proposed to defendant Peter Sandberg that they desired him to undertake to finance the corporation and carry out the contracts for the purpose of protecting as far as possible his endorsement on the bonds and notes of the Company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, [115] as Trustees, for the use and benefit of

said stockholders and not otherwise. That said stock was to be held by said Trustees until such time as defendant Peter Sandberg could make an investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholders should direct. That in accordance therewith defendant Peter Sandberg, immediately caused an investigation and examination of said contracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified said stockholders, whereupon said stockholders directed said Newton H. Peer and Charles T. Peterson as Trustees to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer and Charles T. Peterson as said Trustees carried out said directions and instructions, and transferred all of said stock to said Joseph Wells."

## XXII.

That on June 20, 1910, the Wells Construction Company, Simon Mettler and George Vergowe, executed to defendant Peter Sandberg an indemnity agreement introduced in evidence herein as "Plaintiff's Exhibit No. 10." That on November 26th, 1910, the Kentucky Liquor Company, the Wells Construction Company, Simon Mettler and George Vergowe, made and entered into an agreement introduced in evidence herein, marked "Plaintiff's Ex-

hibit No. —,” which said agreements were made with defendant Peter Sandberg without the knowledge, consent or acquiescence of his wife Mathilda Sandberg, for the purpose of saving defendant Peter Sandberg harmless on account of liability he had incurred on account of the Wells Construction Company, because of the matters and things referred to in said agreements, but that said agreements, or either of them were not for the benefit, or gain, or in the interest of the community consisting of defendants, or for the use, benefit or interest of the defendant Mathilda Sandberg.

## XXIII.

That defendant Peter Sandberg, without the knowledge, consent or acquiescence of Mathilda Sandberg, from time to time signed certain notes and guaranties to banks in British Columbia, referred [116] to in the testimony herein, in addition to the indemnity agreement to plaintiff sued on herein, which said notes and guaranties so signed by defendant Peter Sandberg were for the use and accommodation of the Wells Construction Company, Simon Mettler, George Vergowe and Joseph Wells. That in signing and executing said notes and guaranties, and in signing and entering into the several agreements referred to in the testimony herein, excepting, however, the building contract of the Kentucky Building, and in all of his acts and doings in connection with said notes, guaranties and other agreements, excepting said contract for the Kentucky Building, and in the conveying of the property in trust by Peter Sandberg to the Kentucky Liquor Company, and to



Elmer M. Hayden, and the bringing of the foreclosure suit by said Elmer M. Hayden, and the selling of said property, and in the bringing of said action by Peter Sandberg in the Superior Court of Pierce County, against Carl Mettler and wife, and Simon Mettler and wife, referred to in the testimony, and in the transaction concerning the taking of the capital stock of the Wells Construction Company by Peer and Peterson, as Trustees, and all acts and things that defendant Peter Sandberg may have done in that respect, and with respect to the Wells Construction Company, Simon Mettler, Joseph Wells, George Vergowe, Elmer M. Hayden, as Trustee, the Kentucky Liquor Co., the Molsons Bank, and the Bank of Vancouver, and with plaintiff herein, as referred to in the testimony, with the exception of said building contract for the Kentucky Building, were all matters and things that did not affect or concern the community of defendants, or the defendant Mathilda Sandberg, and were for the sole use, benefit and accommodation of third persons, and were not for the use, benefit, profit or advantage of defendant Peter Sandberg, or of the community consisting of himself and Mathilda Sandberg, his wife, or either of them, nor in the [117] carrying on of the business of himself or wife, or of their community, or of either of them. That the contract regarding the construction of the Kentucky Liquor Company building entered into by the defendant Peter Sandberg with the Wells Construction Company was made and practically carried out and completed prior to the time that defendant Peter Sandberg executed the in-

demnity agreement sued on herein, "Plaintiff's Exhibit No. 2," and that said building contract, and the relationship of the parties thereto was entirely disconnected with any of the other dealings of defendant Peter Sandberg with the Wells Construction Company and the persons and corporations above referred to, and was entirely independent thereof, and was not spoken of or considered by any of the parties in connection with any of the other transactions above referred to, and was entirely independent thereof, and anything done by either of, or any of the parties regarding the Kentucky Building Contract was not a consideration, and was not regarded as a consideration of any of the agreements, endorsements, acts or things done by defendant Peter Sandberg above referred to.

## XXIV.

That during all the times herein mentioned Messrs. Bates, Peer & Peterson were attorneys for Peter Sandberg and for Wells Construction Company and for the receiver of Wells Construction Company and for the Bank of Vancouver in the Mettler bankruptcy proceedings and for Kentucky Liquor Company, and Messrs. Peterson and Peer were on November 26, 1910, president and secretary, respectively, of Wells Construction Company.

## XXV.

That in the latter part of November, 1910, defendant Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at [118] Van-

couver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if defendant Peter Sandberg would finance the Company and enable it to complete the contracts he would be thereby able to save himself any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the corporation, and proposed to defendant Peter Sandberg that they desired him to undertake to finance the corporation and carry out the contracts for the purpose of protecting, as far as possible, his endorsement on the bonds and notes of the Company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as trustees, for the use and benefit of said stockholders and not otherwise. That said stock was to be held by said Trustees until such time as defendant Peter Sandberg could make an investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholders should direct.

That in accordance therewith defendant Peter Sandberg, immediately caused an investigation and examination of said contracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified said stockholders, whereupon said stockholders directed said Newton H. Peer and [119] Charles T. Peterson as trustees to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer and Charles T. Peterson, as said trustees, carried out said directions and instructions, and transferred all of said stock to said Joseph Wells.

## XXVI.

That defendant Peter Sandberg has not kept and performed the agreement of indemnity "Plaintiff's Exhibit No. 2," nor any of the things required by the terms and conditions thereof, and that the Wells Construction Company, nor Simon Mettler, nor George E. Vergowe, nor Joseph Wells, nor any of them have paid, or caused to be paid, or indemnified or reimbursed plaintiff against the amount of the judgment and the losses accruing on said bond.

## XXVII.

Plaintiff and defendants have stipulated as to plaintiff's items of expenses incurred in defending the suit of the Powell River Paper Company, Ltd., v. American Surety Company, in the Supreme Court of British Columbia, in the amount of fifteen hundred, fifty-six and 20/100 dollars (\$1556.20).

## XXVIII.

That in respect to the transactions, matters and things hereinbefore found the plaintiff, in the mak-

ing of its defense in the Supreme Court of British Columbia in the Dominion of Canada against the Powell River Paper Company, Ltd., as aforesaid, under and pursuant to the terms of Plaintiff's Exhibit No. 2, laid out and expended the sum of fifteen hundred, fifty-six and 20/100 dollars and that said Peter Sandberg agreed to repay the same under and pursuant to the terms and conditions of said indemnitor's agreement aforesaid and the same has not been repaid, either by Sandberg or anyone else.

From the foregoing Findings of Fact, the Court makes the following: [120]

## CONCLUSIONS OF LAW.

### I.

That plaintiff is entitled to have and recover of, and from Peter Sandberg the sum of twenty-five thousand dollars (\$25,000) and interest thereon at six per cent (6%) per annum from the 20th day of September, 1913, until paid.

### II.

That, under the terms and conditions of "Plaintiff's Exhibit No. 2," heretofore mentioned in these findings, there was expended the sum of fifteen hundred, fifty-six and 20/100 dollars (\$1556.20) in defense of the liabilities adjudicated against plaintiff by said Supreme Court of British Columbia, and Peter Sandberg thereby agreed, as indemnitor, to repay the same, but has not done so, nor have the same been paid, and plaintiff is entitled to have and recover of and from Peter Sandberg the said sum of fifteen hundred, fifty-six and 20/100 dollars (\$1556.20) with interest thereon at the rate of six

per cent (6%) per annum from September 20, 1913, until paid.

III

That plaintiff's action should be dismissed as to defendant Mathilda Sandberg.

IV.

That said judgment should provide that it is a separate debt of defendant Peter Sandberg, and not a debt, liability or obligation of defendant Mathilda Sandberg, or of the community consisting of Peter Sandberg and Mathilda Sandberg, his wife, and that the same should provide that it is not, and does not constitute a lien or a cloud on the title of the real property of defendants hereinabove specifically set forth.

Let judgment be entered accordingly.

Dated: October 22, 1915.

EDWARD E. CUSHMAN,  
Judge. [121]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [122]

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**Exceptions of Plaintiffs to Findings of Fact and  
Conclusions of Law Made Herein October 22,  
1915.**

Comes now American Surety Company of New York, above-named plaintiff, and presents these its exceptions and objections by its attorney to the action of the Court in making its findings of fact and

conclusions of law herein in October 22, 1915, as the said Court did, to wit:

**FIRST EXCEPTION:**

Plaintiff excepts to the failure and refusal of the Court to find the facts as in the first finding of fact requested by the plaintiff and to the modification thereof by the Court and to the failure of the Court to find thereon in accordance with the evidence.

**SECOND EXCEPTION:**

Plaintiff excepts to the action of the Court in failing and refusing to find the facts as requested in the sixth to the twelfth findings of facts by the plaintiff, all inclusive, and in failing and refusing to find the facts as requested therein and to any modification of the same made by the Court and to the failure of the Court to find facts shown by the evidence as requested by plaintiff in said requested findings.

**THIRD EXCEPTION:**

Plaintiff excepts to the failure and refusal of the Court to find as in the seventeenth finding of fact requested by plaintiff and to the failure of the Court to make any finding the equivalent thereof from the evidence and to the Court's modification thereof by the findings of fact it did make. [123]

**FOURTH EXCEPTION:**

Plaintiff excepts to the failure and refusal of the Court to find as in the twenty-third to the thirty-fourth findings of fact requested by the plaintiff, all inclusive, and to the modifications by the Court thereof and to the failure and refusal of the Court to find facts the equivalent thereof as shown by the evidence.

**FIFTH EXCEPTION:**

Plaintiff excepts to the failure and refusal of the Court to find the fact as set forth in the thirty-seventh finding of fact requested by plaintiff and to its failure and refusal to find any fact the equivalent thereof as shown by the evidence.

**SIXTH EXCEPTION:**

Plaintiff excepts to the failure and refusal of the Court to grant and make the first to the ninth, all inclusive, conclusions of law requested by plaintiff and to the failure of the Court to find conclusions of law from the facts the equivalent thereof and to the modification by the Court of the conclusions of law so made and requested by the plaintiff.

**SEVENTH EXCEPTION:**

Plaintiff excepts to the failure and refusal of the Court to find the twelfth conclusion of law as requested by plaintiff.

**EIGHTH EXCEPTION:**

Plaintiff excepts to the order entered on the 22d day of October, 1915, wherein the findings therein named and herein excepted to were denied and wherein the conclusions herein excepted to were denied by the Court when it made its findings of fact and conclusions of law which the Court did render and file. [124]

**NINTH EXCEPTION:**

Plaintiff excepts to finding of fact numbered I as made by the Court for the reason that it eliminates as part thereof that Peter Sandberg did the things specified "in the regular ordinary course of business."



**TENTH EXCEPTION:**

Plaintiff excepts to the action of the Court in making finding of fact numbered VI because the same is against the evidence and against the admitted knowledge of her means of inquiry and the actual knowledge of her attorneys, Messrs. Bates, Peer & Peterson.

**ELEVENTH EXCEPTION:**

Plaintiff excepts to the finding of fact numbered IX wherein it is found that the notice of the 17th of May, 1911, was served upon Peter Sandberg "at his place of business," whereas the evidence shows and the notice itself in evidence with proof of service attached thereto exhibits, that upon that date there was served upon Peter Sandberg as his residence and at the residence of Mathilda Sandberg in Tacoma, a notice as specified in said finding, which is Plaintiff's Exhibit 4, and that said finding IX is against the evidence for that Mathilda Sandberg had means of knowledge and her attorneys, Messrs. Bates, Peer & Peterson, knew of all the matters and things contained in said notice.

**TWELFTH EXCEPTION:**

Plaintiff excepts to the finding of fact numbered XII and to the whole thereof because it is an argumentative interpretation of the evidence and not a finding of fact and is against the law and against the evidence. [125]

**THIRTEENTH EXCEPTION:**

Plaintiff excepts to finding of fact numbered XXII as made by the Court for the reason that it is not a finding of fact but a conclusion of law and

so far as it undertakes or purports to be a finding of fact it asserts and pretends to find that the agreements therein referred to were made without the knowledge, consent or acquiescence of the defendant Mathilda Sandberg, which part of said finding is against the evidence and against the law and upon a matter which could not be put in issue by the pleading.

**FOURTEENTH EXCEPTION:**

Plaintiff excepts to finding of fact numbered XXIII as made by the Court for the reason that the same is not a finding of fact but an argumentative interpretation of the fact and a conclusion of law not supported by the evidence and against the evidence.

**FIFTEENTH EXCEPTION:**

Plaintiff excepts to conclusion of law numbered III as made by the Court for the reason that said conclusion of law does not follow from the facts found and is against the evidence on the whole record and against the law.

**SIXTEENTH EXCEPTION:**

Plaintiff excepts to the conclusion of law IV as made by the Court for the reason that said conclusion of law does not follow from the facts found and is against the evidence on the whole record and against the law.

W. C. BRISTOL,

Attorney for Plaintiff. [126]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 1, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [127]

**Journal Order Extending Time to File Bill of Exceptions and Overruling Plaintiff's Exceptions to Findings of Fact and Conclusions of Law.**

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 13th day of June, A. D. 1916, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:

No. 1605.

AMERICAN SURETY COMPANY OF NEW YORK,

vs.

PETER SANDBERG et ux.

It is now ordered that the exceptions of plaintiff to findings of fact and conclusions of law be and the same are overruled and exception is allowed, and plaintiff is allowed 90 days in which to file its bill of exceptions. [128]

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**Judgment.**

This cause came on to be heard at the July term of the above-entitled court, and was argued by counsel for the respective parties, and thereupon and upon consideration thereof the Court made and filed herein on the 31st day of July, 1915, its decision in writing, and thereafter, and on the 22 day of Octo-

ber, 1915, made and filed its Findings of Fact and Conclusions of Law in writing, wherein and whereby it found and determined all of the facts herein, it is now therefore in accordance with said decision and Findings of Fact and Conclusions of Law as aforesaid,—

ORDERED, ADJUDGED AND DECREED that plaintiff, American Surety Company, of New York, a corporation, do have and recover of defendant Peter Sandberg, judgment in the sum of twenty-six thousand five hundred and fifty-six and 20/100 (\$26,556.20) dollars, together with interest thereon at the rate of 6% per annum from the 20th day of September, 1913, until paid, together with the costs of this action to be taxed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said action be and the same is hereby dismissed as against defendant Mathilda Sandberg, and as against the community consisting of Mathilda Sandberg and her husband, Peter Sandberg.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the following described real property situated in the counties of King and Pierce, State of Washington, is the community real property of the defendants Peter Sandberg and Mathilda Sandberg, his wife, to wit:

Lots 13 and 14, in Block 1104; Lots 10, 11 and 12, in Block 1403; Lots 7 and 8, in Block 1101; and Lots 11 and 12, in Block 1303; in the City of Tacoma, as the same are designated upon a certain map entitled, "Map of New Tacoma, Washington Terri-

tory," which map was filed for record in the office of the County Auditor of said County, February 3, 1875.

Beginning at the intersection of the North line of Lower [129] Eleventh Street South with the East line of the City Waterway, as shown on the Supplemental Plat of Tacoma Tide Lands; thence Easterly along the North line of Lower 11th Street 393.206 feet; thence Northerly along a line making an angle of 73 degrees, 50 minutes 02 seconds with the last described course 184.181 feet; thence Westerly along a line at right angles to the line last described 356.033 feet to the Eastern line of the City Waterway 77.77 feet to the point of beginning. Also commencing at the intersection of the North line of Lower South 11th Street with the East line of City Waterway above described; thence Easterly along the North line of Lower South 11th Street 476.499 feet, to the place of beginning of the tract herein described; thence Northerly along a line making an angle of 73 degrees 50 minutes 02 seconds with the last described course 173.510 feet; thence Southerly along a line at right angles to the last described course 302.416 feet to the North line of Lower South 11th Street; thence Westerly along said North line of Lower South 11th Street 175.133 feet to the place of beginning.

Lots 1, 2, 3 and 4, Block 1112 Tacoma Land Company's Addition;

Lots 11 and 12, Block 7638 Tacoma Land Company's Seventh Addition;

Lot 1, Block 61, Balch's Addition to Steilacoom,

Pierce County, Washington;

West  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ , less 1  $\frac{38}{100}$  acres, and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , Section 8, Township 8, Range 5 East, Pierce County;

West half of Section 2, Township 20, Range 7, King County, Washington;

North  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  of Section 12, Township 20, Range 7, and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , Section 12, Township 20, Range 7, King County, Washington;

Southwest quarter of Section 6, Township 20, Range 8, King County, Washington;

East  $\frac{1}{2}$  of Southeast  $\frac{1}{4}$ , Section 10, Township 20, Range 8, King County, Washington;

All of which said property was acquired after the marriage of the defendant Mathilda Sandberg to her codefendant Peter Sandberg, and by their joint efforts.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the judgment herein entered against defendant Peter Sandberg is not, and does not constitute a lien, encumbrance or cloud upon the title to said real property above described, or any part thereof, or upon any of the community real property owned by the defendants [130] herein, and it is further ordered, adjudged and decreed that said real property above described, or no part thereof shall be levied upon or sold to satisfy the judgment entered herein, or any part thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that defendant Mathilda Sandberg have and recover judgment against plaintiff

*vs. Peter Sandberg and Matilda Sandberg.* 167

for her costs and disbursements herein to be taxed.

Dated, this 13th day of June, A. D. 1916.

EDWARD E. CUSHMAN,

Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jun. 13, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [131]

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**Order Extending Time to Prepare, etc., Bill of Exceptions Sixty Days from September 11, 1916.**

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 14th day of August, A. D. 1916, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:

No. 1605.

AMERICAN SURETY COMPANY OF NEW YORK,

vs.

PETER SANDBERG et ux.

It is now ordered that the time to prepare and present bill of exceptions in this case is extended sixty days from Sept. 11, 1916. [132]

**Order Extending Time to Settle, etc., Bill of Exceptions Sixty Days from November 11, 1916.**

This cause being further heard and it appearing that the bill of exceptions has been prepared and filed within the time heretofore allowed by the Court, but that there are pending negotiations between respective counsel to settle said bill, now upon consideration of the Court, it is

ORDERED, that the plaintiff may have an additional period of sixty (60) days from and after November 11, 1916, within which to settle said bill of exceptions and present the same to the Court for signature.

Dated October 28, 1916.

EDWARD E. CUSHMAN,  
District Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 28, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [133]

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**Order Extending Time for Settlement of Bill of Exceptions to January 12, 1917.**

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 5th day of January, 1917, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:



No. 1605.

AMERICAN SURETY COMPANY OF NEW  
YORK,

vs.

PETER SANDBERG et ux.

Upon consent of attorneys for both sides, it is now ordered that the time for settlement of the bill of exceptions herein be extended to January 12, 1917, at ten o'clock A. M. [134]

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**Order Extending Time to Settle Bill of Exceptions,  
etc., to March 6, 1917.**

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 11th day of January, 1917, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:

No. 1605.

AMERICAN SURETY COMPANY OF NEW  
YORK,

vs.

PETER SANDBERG et ux.

It is now ordered that the time within which to settle the bill of exceptions in the above case be, and it is hereby extended from January 12, 1917, to March 6, 1917, on account of illness of one of the attorneys for defendants. [135]

**Order Extending Time to Settle Bill of Exceptions.**

It is by the Court ordered that the July, 1916, term of this court be, and the same is hereby extended for a period of ten days from the date hereof, for the purpose of settling the bill of exceptions in the above-entitled cause.

By the Court, this 5th day of February, 1917.

EDWARD E. CUSHMAN,

Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 5, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [136]

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**Bill of Exceptions as Settled and Certified.**

For the purpose of making those matters and things that occurred upon the trial of this cause of record herein, it is certified that on the 4th day of June, 1915, the above-entitled cause came on duly and regularly for hearing in the above-entitled court before Honorable E. E. Cushman, Judge of said court, and there and then the defendants appeared in person and by their attorneys, Messrs. Bates, Peer & Peterson, and the plaintiff by its attorneys and solicitors of record, and the cause was tried before the Court sitting as a jury pursuant to stipulation of the parties, and after the opening statements of respective counsel the plaintiff offered in evidence Exhibit No. 1, and application signed by the Wells Construction Company and Joseph Wells to the plaintiff, American Surety Company of New York,

for a bond of indemnity upon a contract with Powell River Paper Company, Ltd., this being the application alleged in the complaint as rejected by the plaintiff because of insufficient indemnity.

The community of Sandberg and wife, Mathilda Sandberg, objected to the offer of Exhibit 1, on the grounds that it was not signed by either of them, and was not binding upon them, and for want of preliminary proof thereon as to its authenticity, which objection was overruled.

Thereupon plaintiff offered in evidence Plaintiff's Exhibit No 2, which is the application set forth in the complaint of defendant, Mathilda Sandberg, in her own behalf and in behalf of [137] the community of Sandberg and wife, objected to said offer on the grounds that it was incompetent, irrelevant and immaterial, and did not tend to prove any issue in so far as she and the community were concerned, which objection was, by the Court, overruled. A copy of said application constitutes pages 21½ of this record.

Thereupon there was introduced in evidence, the bond described in the complaint, and the same was received and marked Plaintiff's Exhibit No. 3, being a document obligating American Surety Company as surety to Powell River Paper Co., Ltd., in the sum of twenty-five thousand (\$25,000) dollars being the bond referred to in the complaint to which defendant Matilda Sandberg, in her own behalf and in behalf of the Sandberg community, made the same objection as was made to Exhibit No. 2, which

was overruled, and the same was received in evidence.

Thereupon there was offered in evidence Plaintiff's Exhibit No. 4, consisting of the notice alleged in the complaint served upon Wells Construction Company, Simon Mettler, George E. Vergowe, Peter Sandberg and Joseph Wells, to which defendant, Matilda Sandberg, and the Sandberg community made the same objection as was made to Exhibit 2, and the same was received and considered in evidence.

Thereupon there was offered and received in evidence Plaintiff's Exhibit No. 5, consisting of the certified copy of the judgment in the Supreme Court of British Columbia in the case of Powell River Paper Company, Ltd., plaintiff, against Wells Construction Company and American Surety Company of New York, defendants, to which defendant, Matilda Sandberg and the Sandberg community, made the same objection as was made to Exhibit No. 2. [138]

Thereupon there was offered a stipulation between counsel comprising the amount of expenses and outlays incurred by American Surety Company fixed at the sum of \$1556.20, the defendants reserving the right to contest any liability, however, as to said item.

There was thereupon offered in evidence, a certified copy of the complaint in the Superior Court of the State of Washington in cause numbered 30878, wherein Peter Sandberg was plaintiff and Simon Mettler and others defendants, and the same was

marked Plaintiff's Exhibit No. 7, to which defendant, Matilda Sandberg and the Sandberg community, made the same objection as was made to Exhibit No. 2.

Whereupon the Court stated, "the objection will be overruled. These objections being general, not specific, nothing is called to the attention of the Court but admissions in the pleadings of one lawsuit claimed to be against the pleadings in another lawsuit will, in many cases have very little weight because the party in his pleadings always takes extreme positions." Whereupon said paper was admitted in evidence.

Thereupon there was offered and introduced in evidence a certified copy of the interrogatories and answers thereto in the Superior Court of the State of Washington, in and for Pierce County, in cause numbered 35986, wherein the Molson's Bank was plaintiff and Peter Sandberg and Matilda Sandberg, his wife, were defendant, which interrogatories were verified by defendant Peter Sandberg alone, and were not verified by Matilda Sandberg, and wherein the defendants Peter Sandberg and Mathilda Sandberg, his wife, made answers to said interrogatories, all of which were contained in a certified document then offered in evidence by the plaintiff, to which defendant Mathilda Sandberg, and the Sandberg community, made the same objection as was made to [139] Exhibit No. 2, which objection was overruled, and the same was received in evidence and marked Plaintiff's Exhibit No. 8, and there was there and then offered and read to

the Court the interrogatories and answers as follows, to wit:

INTERROGATORY No. I.

Did the Wells Construction Company do any work for you, or either of you, at any time before the execution of the note sued on in this case?

ANSWER TO INTERROGATORY No. I.

Yes.

INTERROGATORY No. II.

If you answer the preceding interrogatory in the affirmative, please state the time, character and amount of the work done, and the contract price therefor.

ANSWER TO INTERROGATORY No. II.

The Wells Construction Company started the construction of a seven-story concrete building 25 feet in width and 100 feet in length adjoining another building of like size owned by defendant on Lot 12, Block 1104, of the city of Tacoma, during the month of February, 1910. That said building was to be of reinforced concrete, and was to have been completed by said company on or before May 1st, 1910. That the contract price therefor was thirty-three thousand (\$33,000) dollars. That during the construction of said building an additional story was added thereto as an extra, at the agreed price of thirty-five hundred (\$3500) dollars. That there were certain other extras consisting of the digging of a concrete sub-basement, and the enlarging of a chimney, and some extra work in a store adjoining, and the furnishing of some extra sash in the halls of the old adjoining building, and extra

painting, amounting in all to \$1379, making the total contract price for said building, including [140] extras \$37,879.

INTERROGATORY No. III.

What did you ever pay the Wells Construction Company for the work done by them for you?

ANSWER TO INTERROGATORY No. III.

I paid the Wells Construction Company \$25,794.40 in cash, and paid materialmen for material going into the construction of said building under said contract, which material bills said Wells Construction Company were liable for under said contract and agreed to pay, and left unpaid, the sum of \$1677.84, which I paid at the request and instance of the Wells Construction Company.

That in the construction of said building certain deductions were made by defendants, on account of the moneys to become due the Wells Construction Company, as follows:

40 days labor at cleaning up around building, at \$2.50 per day.....	\$ 100.00
Cleaning of floors in third story of the old and new building.....	300.00
2 doors taken out in the old <i>Dentucky</i> building .....	100.00
Breaking of skylight in Langlow Building, adjoining .....	17.90
Cost of installing switches for lights in Kentucky Building .....	700.00
Wiring floors for bell push buttons.....	200.00
10 Fire doors short.....	200.00
<hr/>	
Total.....	\$1617.90

That in addition thereto defendants cancelled a claim against the Wells Construction Company for demurrage at the rate of twenty-five dollars per day, for every day said building remained uncompleted after May 1st, 1910, under the terms of said contract, which claim for demurrage extended from May 1st, 1910, to November 29th 1910.

INTERROGATORY No. IV.

Is it not true that you owe them for the construction of *of* [141] building in Tacoma?

ANSWER TO INTERROGATORY No. IV.

No.

INTERROGATORY No. V.

If you say you do not owe anything, then state when and how you paid them for the building they built for you.

ANSWER TO INTERROGATORY V.

Paid them as set forth in answer to Interrogatory No. III.

INTERROGATORY No. VI.

State when it was the Wells Construction Company constructed a building for you in Tacoma. Give the date they commenced the work and date of the completion of same.

ANSWER TO INTERROGATORY No. VI.

The Wells Construction Company began the construction of a building for defendants in February, 1910, and worked on the same until some time in the month of October, 1910, when defendants were required to complete the building themselves.

INTERROGATORY No. VII.

When and how did you or either of you become in-



terested in the Wells Construction Company?

ANSWER TO INTERROGATORY No. VII.

Defendants, nor either of them, never became interested in Wells Construction Company.

INTERROGATORY No. VIII.

Is it not true that the defendant Peter Sandberg compelled the other stockholders of the Wells Construction Company to assign their stock and turn the same over to his attorneys, for his use?

ANSWER TO INTERROGATORY No. VIII.

No. [142]

INTERROGATORY No. IX.

Is it not true the stock of this corporation was assigned in blank, and turned over to your attorneys?

ANSWER TO INTERROGATORY No. IX.

No, the stock was turned over to Newton H. Peer and Charles T. Peterson under the following agreement:

In the latter part of November, 1910, defendant, Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at Vancouver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if defendant Peter Sandberg, would finance the company and enable it to complete the contracts he would be thereby able to save himself

any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the corporation, and proposed to defendant Peter Sandberg that they desired him to undertake to finance the corporation and carry out the contracts for the purpose of protecting as far as possible his endorsement on the bonds and notes of the company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as trustees, for the use and benefit of said stockholders and not otherwise. That said stock was to be held by said trustees until such time as defendant Peter Sandberg could make an [143] investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholder should direct. That in accordance therewith defendant Peter Sandberg immediately caused an investigation and examination of said contracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified said stockholders, whereupon said stockholders directed said Newton H. Peer and Charles T. Peterson as trustees

to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer as said trustees carried out said directions and instructions, and transferred all of said stock to said Joseph Wells.

INTERROGATORY No. X.

Is it not true that the defendant Peter Sandberg entered into an agreement to carry out certain work or contracts of the Wells Construction Company in British Columbia?

ANSWER TO INTERROGATORY No. X.

No.

INTERROGATORY No. XI.

Please state just what the agreement was, and attach a copy of the same to your answer.

ANSWER TO INTERROGATORY No. XI.

The agreement and circumstances regarding the turning over of the stock is fully set forth and stated in answer to Interrogatory No. IX, and was made orally.

INTERROGATORY No. XII.

Did you carry out your part of the agreement?  
[144]

ANSWER TO INTERROGATORY No. XII.

The answer to Interrogatory No. XI covers this.

INTERROGATORY No. XIII.

At whose request did you execute the notes mentioned in your answer, and the note sued upon in this case?

ANSWER TO INTERROGATORY No. XIII.

At the request of Simon Mettler and Joe Wells.

INTERROGATORY No. XIV.

Where were you when the notes were signed, and

where was the guaranty agreement executed that you mentioned in your answer.

ANSWER TO INTERROGATORY No. XIV.

As near as I remember the notes were signed here at Tacoma, and the guaranty agreement was signed at the Molson Bank in Vancouver, B. C.

INTERROGATORY No. XV.

The men signing the written guaranty agreement mentioned in your answer were members of the Wells Construction Company, were they not?

ANSWER TO INTERROGATORY No. XV.

So far as I know they were, excepting myself, I was not.

INTERROGATORY No. XVI.

Why did you execute this guaranty agreement, which made you liable for more than \$55,000?

ANSWER TO INTERROGATORY No. XVI.

I executed it for the accommodation of the Wells Construction Company, a corporation, and particularly for Simon Mettler.

INTERROGATORY No. XVII.

How much did you owe the Wells Construction Company at the time you signed this guaranty, or at the time you signed any of [145] the notes you mention?

ANSWER TO INTERROGATORY No. XVII.

I did not owe it anything.

INTERROGATORY No. XVIII.

Do you, Peter Sandberg, defendant, deny personal liability on the note sued upon, and for the amount alleged? If you say that you do deny liability, state the reasons why.

ANSWER TO INTERROGATORY No. XVIII.

No, because I signed the note.

BATES, PEER & PETERSON,  
Attorneys for Defendants.

State of Washington,  
County of Pierce,—ss.

Peter Sandberg, being first duly sworn, on oath deposes and says: That he has read the foregoing answers, and the same are true, as he verily believes.

PETER SANDBERG.

Subscribed and sworn to before me this 26th day of May, A. D. 1914.

CHARLES T. PETERSON,  
Notary Public in and for the State of Washington,  
Residing at Tacoma.

Whereupon plaintiff rested its case.

Thereupon the defendant Mathilda Sandberg, on her own part, moved for a judgment of nonsuit and dismissal of the plaintiff's action as to her and the defendants Peter Sandberg and Mathilda Sandberg, as a community, moved the Court for a judgment of nonsuit and dismissal as to the community represented by them.

Both of these motions were overruled, the Court saying: "I think it would be better to overrule the motion temporarily at this time until the case is finally completed and hear the [146] argument all together."

**Testimony of Matilda Sandberg, in Her Own Behalf.**

Thereupon MATILDA SANDBERG, one of the defendants, testified as a witness in her own behalf and in behalf of the defendants to the following effect: That she was the wife of Peter Sandberg; That said defendant and Peter Sandberg were married November 30th, 1894; that at the time of their marriage defendant, Peter Sandberg, owned two lots in the city of Tacoma, worth about six hundred (\$600) dollars; that all of the property set forth in paragraph II of her answer, filed in this case, was acquired by her and her husband during the existence of their marriage, by their joint efforts; that said two lots, owned by Sandberg at the time of their marriage were afterwards sold and went into the community; that the list of real property set forth in paragraph II of the answer of Matilda Sandberg, and including the property where the Kentucky Building stands and the property where the Davis-Smith Building stands, was all community property; that Peter Sandberg and herself had been living together as husband and wife up to the time of trial and were then; that she knew nothing about Peter Sandberg indemnifying the American Surety Company of New York against any loss because of the American Surety Company going on the bond in the sum of twenty-five thousand (\$25,000) dollars for Wells Construction Company, and that she did not have anything to do with it or participate in it in

(Testimony of Matilda Sandberg.)

any way at all, and that she only heard of the transaction lately and after the lawsuit had commenced.

On cross-examination this witness testified that she was sure that none of the property which had been described in her answer was ever the property of Peter Sandberg before they were married and that she was sure he did not have any other property, and during all of the time that they had lived together [147] Mr. Sandberg was looking after all of the property interests and was looking after all of the business and that she always trusted her husband and did not take any part in that and that whatever had been made and whatever had been done had been done by Mr. Sandberg and she went along with him as his dutiful wife.

Subsequently this witness was recalled and testified that she never owned any stock in the Wells Construction Company nor was never interested in any way, and when she was asked whether she understood about her husband looking after all of their business and she answered that she had trusted him she understood it to be that the husband was looking after all of her business; that it was not contended that Mrs. Sandberg did not know that the Kentucky Building was being erected.

Thereupon the following proceedings took place:

“Q. Mr. Peterson has asked you whether or not you had any stock and you said no, and I am asking you whatever Mr. Sandberg did with the Wells Construction Company was agreeable to you, wasn't it?

(Testimony of Matilda Sandberg.)

Mr. PETERSON.—I want to object to that because that is entirely collateral. There may have been other matters and other things to which this matter has no connection with this transaction, which is a different proposition, or Mr. Sandberg may have had other dealings. The fact is that he did not, but it is not proper cross-examination.

Objection overruled. Exception allowed.

(Last question read by the reporter.)

Mr. PETERSON.—The witness must first have knowledge and then she must acquiesce and consent in the matter in order for her to be estopped. That is the only purpose of an interrogation of this kind. Otherwise it is immaterial.

Mr. BRISTOL.—Are you going to contend that Mrs. Sandberg did not know this building was being erected?

Mr. PETERSON.—No, sir. [148]

The COURT.—Objection overruled. Answer the question.

(Question read again by the reporter.)

A. Well, he did not have anything to do with it I understood.

Q. You heard Mr. Wells' testimony when he was on the stand? You were in the courtroom?

A. Yes, sir.

Q. If Mr. Wells told the truth, and let us assume that he did, I do not know anything about it except that he swore to, were those transactions which Mr. Sandberg had with the Wells Construction Company with your knowledge and consent?



(Testimony of Matilda Sandberg.)

A. I do not know anything about it.

Q. Was whatever Mr. Sandberg did in connection with that building agreeable to you?

Mr. PETERSON.—I want to object to that as not proper cross-examination. That is merely speculation and conclusion for this witness to say that at this time.

Objection overruled. Exception allowed.

Mr. PETERSON.—I want permission of the Court to ask this witness a question in that connection.

The COURT.—Proceed.

Mr. PETERSON.—Q. Mrs. Sandberg, did you know about the dealings and transactions of Mr. Sandberg with the Wells Construction Company regarding this building and regarding other matters?

A. No, sir.

Mr. BRISTOL.—I asked him if he contended that Mrs. Sandberg did not know that Mr. Sandberg was putting up this building. Now, he turns around and tries to stultify Mrs. Sandberg by asking this question. I assume, as a member of long standing at this and other bars that that way of trying a case would be disrespectful to your Honor, and I object to that and move to have these proceedings stricken out.

The COURT.—Motion denied and the objection overruled. The question not only involves what Mr. Sandberg had to do with the Wells Construction Company with reference to the construction of the building, but also about the giving of this bond. For Mr. Peterson to say that she did not know that the

(Testimony of Matilda Sandberg.)

building was being constructed would not carry any—(Interrupted).

Mr. BRISTOL.—We are talking about the building in this connection. [149]

The COURT.—You said whatever he had to do with the Wells Construction Company.

Mr. BRISTOL.—You have ruled upon that and he has constantly interrupted. I submit that we have got to this issue as to whether or not a married woman can be put upon the stand and deny knowledge of her husband's acts, and if that is going to be the issue here I am willing to meet it.

The COURT.—There is nothing before the Court at this time as I recall.

Mr. BRISTOL.—Then I will repeat my question.

Q. Mrs. Sandberg, did you know that your husband—(Interrupted).

Mr. BATES.—Let me call your attention to the fact that there is a question—(Interrupted).

Question read by the reporter as follows: 'Mrs. Sandberg, did you know about the dealings and transactions of Mr. Sandberg with the Wells Construction Company regarding this building and regarding other matters?'

The COURT.—I have sustained your objection to the question because there are two questions in one.

Mr. BRISTOL.—That is not my objection.

The COURT.—This is for the aid of the Court, no matter whether she answered yes or no I would still be in doubt as to what she meant.

(Testimony of Matilda Sandberg.)

Mr. PETERSON.—Well, then, I will ask permission to ask another question.

Q. Mrs. Sandberg, did you know about Mr. Sandberg's dealings with the Wells Construction Company with reference to this undertaking and agreement with the American Surety Company?

Mr. BRISTOL.—I object to that as immaterial whether she knew it or not.

The COURT.—That is one of the final issues in the case. The objection will be overruled.

Exception allowed.

A. No, sir.

Mr. BRISTOL.—Q. Did you know that Mr. Sandberg was putting up this building?

A. Well, he put up many buildings. Which do you mean?

Q. The Kentucky Building? A. Yes, sir.

Q. When did the construction of that building commence? [150]

A. I have not kept any books, so I do not know.

Q. What is your best recollection when it commenced?

A. Well, I really could not answer you.

Q. Mr. Wells testified that it commenced in the fall of 1909. Do you remember whether that is so or not?

A. No, sir; I do not.

Q. Mr. Wells stated that the excavation of that building was finished in January, 1910. Do you remember whether that is so or not? A. No, sir.

Q. Did you ever see that building in the course of construction? A. Yes, sir.

(Testimony of Matilda Sandberg.)

Q. When.      A. Well, I do not remember.

Q. Was it during 1910?      A. I could not say.

Q. Did you go there at any time with your husband?      A. Yes, sir.

Q. How often did you go to the building with your husband during the course of its construction?

A. I do not know; I could not answer that.

Q. Well, was it more than once, twice or three times, or frequently?      A. I could not answer.

Q. How many times do you think it was?

A. Maybe two or three times; I do not know.

Q. How often did you go to the building, directing your attention to the summer of 1910, between the months of May and September before all the little odds and ends had been finished up and the building had been turned over completely, just before that how often do you think you had gone there with your husband?

A. I could not say. I do not believe I was down there once.

Q. You do not think you went there once? [151]

A. No, sir.

Q. You do not think you went to the building at all?      A. No, I do not think I did.

Q. You do not think you went to the building at all?      A. No, sir.

Q. And you never saw the building while it was being constructed?      A. Yes, sir.

Q. And you knew your husband was putting it up?

A. Yes, sir.

(Testimony of Matilda Sandberg.)

Q. And you knew the Wells Construction Company was doing the work for him?

A. I could not answer that, because I do not know.

Q. You saw Mr. Wells before that?

A. Yes, sir.

Q. You knew he was doing that work?

A. I seen him working there.

Q. That was one of the pieces of property you and your husband acquired after you were married?

The COURT.—She has already answered that.

A. Yes, sir.

Q. And you knew it cost money to put up that building there?     A. Yes, sir.

Q. You naturally knew that your husband would have to make payments on that building contract?

Mr. PETERSON.—I object to that on the ground that it is not proper cross-examination and argumentative.

The COURT.—Objection sustained.

Mr. BRISTOL.—Of course, I have not under the rules of this court any right to assume anything and so I am not assuming, but I am assuming to your Honor as a matter of courtesy that when a witness is turned over for cross-examination, under the circumstances that this record denotes, that counsel's argument during a testy situation concerning an issue which your Honor pronounced the main issue in the case, that I now remind your Honor respectfully of the rule; that I have an unwilling witness; [152] that I should be allowed that judicial width of examination which I am entitled to.

(Testimony of Matilda Sandberg.)

The COURT.—But to assume that there is any question about the witness knowing of the building of an eight story building; that a man would not pay money for it when he got it built, and had to pay for it, did not seem to me like proper cross-examination.

Mr. BRISTOL.—Q. Do I understand that you claim you did not know anything about the putting up of this building?

Mr. PETERSON.—I submit that that has been answered.

Objection overruled.

Mr. BRISTOL.—Q. Do I understand you to state here that you did not know your husband, Peter Sandberg, was putting up this building?

A. Yes, he was putting up the building so far as I know.

Q. In the course of his entire business career in Tacoma, and while you have been married to him, has he told you item by item and in each case all of the transactions he has had?

Mr. PETERSON.—I object to that as not proper cross-examination. I called this witness for two questions.

Objection overruled. Exception allowed.

Mr. PETERSON.—I think counsel should make the witness his own witness in this matter so we can cross-examine.

Objection overruled. Exception allowed.

(Question read.)

A. No, sir.

Q. So there have been many of his business trans-

(Testimony of Matilda Sandberg.)

actions, including those with the Wells Construction Company that you did not know anything about?

A. No, sir, I do not know anything about them.

Q. Might I ask you if one of those transactions—now, I want to say to the Court and to you, Mrs. Sandberg, that Mr. Peterson has forced me to submit this matter to you, and I would not do it if it had not been for Mr. Peterson's attitude toward me. I show you Exhibit No. 8 in which you as a defendant, Peter Sandberg and Matilda Sandberg together, in the Superior Court of the State of Washington, make answers to certain interrogatories, and you were asked in those interrogatories, 'Did the Wells Construction Company do any work for you or either of you at any time before the execution of the note sued on in this case? Answer, Yes.' Now, if it can be possibly true that you have no knowledge about this Wells Construction [153] Company business, how could you say 'Yes' to that interrogatory? Now, look at the paper and think it over yourself.

Mr. PETERSON.—Did she verify any of those interrogatories?

Mr. BRISTOL.—I do not care whether she verified it or not. You put your name to them.

The COURT.—If you are going to be so positive with one another, stand further away from the witness.

The COURT.—(Addressing the witness.) Do you understand the question, or have you any explanation to make of your answer.

(Testimony of Matilda Sandberg.)

A. I do not know what answer to make; I cannot understand this at all.

Mr. BRISTOL.—Q. You said in that particular interrogatory when they asked you if the Wells Construction Company was doing any work for you, you answered yes, did you not?

A. Yes, sir.

Q. Now, when they got along a little further, looking at this interrogatory, the second interrogatory this time, where Messrs. Bates, Peer & Peterson in this case for the defendants, and Mr. Sandberg, your husband, swears to it, 'Peter Sandberg, being first duly sworn, on oath deposes and says that he has read the foregoing answers and the same are true as he verily believes.' That second interrogatory was, 'If you answer the preceding interrogatory in the affirmative, please state the time, character and amount of the work done and the contract price therefor', and I call your attention to that to which this answer is made: 'The Wells Construction Company started the construction of a seven story concrete building 25 feet in width and 100 feet in length adjoining another building of like size owned by defendant on Lot 12, Block 1104, of the City of Tacoma, during the month of February, 1910. That said building was to be of reinforced concrete, and was to have been completed by said company on or before May 1st, 1910. That the contract price therefor was thirty-three thousand (\$33,000) dollars. That during the construction of said building an additional story was added thereto as an extra, at



(Testimony of Matilda Sandberg.)

the agreed price of thirty-five hundred (\$3500) dollars. That there were certain other extras consisting of digging of a concrete sub-basement, and the enlarging of a chimney, and some extra work in the store adjoining, and the furnishing of some extra sash in the halls of the old adjoining building, and extra painting amounting in all to \$1379, making the total contract price for said building, including extras \$37,879.' Now, in view of that interrogatory and that statement, please explain to me how you can say you do not know anything about your husband's dealings with the Wells Construction Company?

Mr. BATES.—I object to that as incompetent, irrelevant and immaterial and not proper cross-examination, because the paper which the witness is interrogated from shows on its face that they were answers made by Peter Sandberg and not by this witness. [154]

The COURT.—That might be true and yet the question would be preliminary and leading up to how much she knew of those answers. The objection will be overruled.

Exception allowed.

Mr. BRISTOL.—On this very paper prepared by Bates, Peer & Peterson, they say, 'Come now defendants, and answering interrogatories propounded by the plaintiff herein say,' and the husband signed this paper and swore to it, and certainly if they were defendants and she let him do it—

(Interrupted.)

(Testimony of Matilda Sandberg.)

The COURT.—You remember I said in the beginning that pleadings and admissions do not have any great weight with the Court.

Mr. BRISTOL.—I have recollection of the Court's admonition, but I may be pardoned by asserting as a proposition of law that those rules are fixed.

The COURT.—Some of the Courts of the country hold that they are not admissible in evidence at all.

Mr. BRISTOL.—As pleadings in the case, but this happens to be interrogatories in a case in which these very matters are at issue, the question of knowledge of these parties, and it appears in that matter (indicating) and others.

Q. I want to know whether in view of that statement now, and your mind refreshed, you still adhere to the statement that you had no knowledge of what the Wells Construction Company was doing?

A. No, sir, I do not know anything about it.

Q. You do not know anything about it?

A. No, sir.

Q. That is your answer notwithstanding the paper which you hold in your hand? A. Yes, sir.

Mr. BRISTOL.—The paper referred to being Plaintiff's Exhibit No. 8.

#### Redirect Examination.

(By Mr. BATES.)

Q. Mrs. Sandberg, I suppose of course, you knew this eight story building was being built by Mr. Sandberg? A. Yes, sir.

Q. You knew that it was completed?

(Testimony of Matilda Sandberg.)

A. Yes, sir. [155]

Q. Did you know anything about the terms and conditions of the contract under which it was constructed? A. No, sir, I did not.

Q. These questions that have been referred to, did you ever make any answer to those questions yourself? A. No, sir.

Q. Did you ever see them or hear of them before?

A. No, sir.

Q. Know nothing about them whatever?

A. No, sir.

Mr. BATES.—I am referring, if your Honor please, to the questions and answers in Plaintiff's Exhibit No. 8.

Mr. BRISTOL.—Q. Do you know whether Messrs. Bates, Peer & Peterson were your husband's attorneys? A. Yes, sir.

Q. Are Messrs. Bates, Peer & Peterson your attorneys? A. Yes, sir.

(Witness excused.)”

### **Testimony of Joseph Wells, for Defendants.**

JOSEPH WELLS was offered as a witness on behalf of the defendants and among other things testified that he was the original incorporator of Wells Construction Company and had the contract for the *Power River Paper Company, Ltd.*, upon which the American Surety Company of New York, was surety and that that was the contract out of which the paper, Plaintiff's Exhibit No. 2, arose, and that he was vice president for a time and secretary for a time and then held both offices combined;

(Testimony of Joseph Wells.)

I have made a search for the stock-books and corporate books of the Wells Construction Co. in the usual places where those books were kept and where they might be found—looked high and low in Vancouver and in Tacoma in places where they should be found, and I have been unable to find them. I made this search at the request of Mr. Peterson. [156] Part of the books were in Tacoma and part of them in Vancouver, B. C. At one time I was considering getting a man in Vancouver, B. C. to take part of the stock, and my recollection is, I took the stock-books up there. A liquidator was appointed for the company in Vancouver, and a receiver was appointed for the company in Tacoma.

That there had been a receivership of the company and that Lund & Lund were attorneys for Wells Construction Company, and Betes, Peer & Peterson were attorneys for the receiver; that Frank Allyn, of Tacoma, was receiver; that the receiver took possession of the office and took all the books, ledgers and day-books, and the rest of the belongings of the company; that he might have taken the stock-book up to Vancouver himself; that there was a manager in the office in Vancouver by the name of Cederburg and the witness did not know whether Cederburg had possession of the stock-book or not or whether Cederburg took it away; that they had some man up there to talk over the idea of taking this stock; some man by the name of Cotton, to put some money into the company; that it was not a fact that the corporate records of the Wells Construction Company were

(Testimony of Joseph Wells.)

destroyed by himself and he denied that they were destroyed by himself.

Thereupon the witness testified that at no time during the existence of the corporation was Mr. Peter Sandberg a stockholder. To this answer of the question seeking the information plaintiff objected as not the best evidence, mere hearsay and the record had not been found nor accounted for, but the Court permitted the witness to answer and plaintiff saved an exception. [157].

Thereupon the books not being produced, the plaintiff moved to strike out the testimony of the witness that Sandberg was not a stockholder on the ground that necessary diligence had not been shown for the failure to produce the books and the testimony given had not accounted for the failure to produce the books.

Thereupon the Court denied the motion saying:

“It appears to me that if you depend upon the statement of Mr. Sandberg that he was interested in that company, that the statement proves itself, and it does not particularly matter whether it was direct or not. If you contend that he was interested outside of that in this company, the burden is upon you and the defendants need not undertake to overcome it in this way, but I will overrule the objection just simply throwing that out as my intimation of the effect of this evidence at this time.”

To which action and ruling of the Court counsel for plaintiff there and then took an exception.

(Testimony of Joseph Wells.)

On cross-examination this witness testified that they had the stock-books in Vancouver in their office; that when the witness made the trip to Vancouver he had the certificate in his pocket and the stock-book was in the office in Vancouver and that the reason he had the stock certificates in his pocket when the stock-book was in Vancouver was because at that time the stock Mr. Mettler and Mr. Vergowe had was in trust with Mr. Peterson and Mr. Peer and that witness requested to have the stock so he could make the transaction; that the stock-books were not in Tacoma and that they were not in the possession of Messrs. Bates, Peer & Peterson at the time witness went to Vancouver; that the witness could not make any other or different explanation how this stock as a matter of record stood on the books of the company other than with Messrs. Bates and Peterson as trustee.

The witness then testified that Mr. Sandberg paid some of [158] Wells Construction Company accounts direct, like Tacoma Mill Work & Supply Company and the plastering and charged the same to the Wells Construction Company account; that when he made his statement October 3, 1910, he claimed \$37,879, totally due for the building and allowed a credit of \$1,331.40 and that the amount of \$36,547.60 was the amount Peter Sandberg was debtor to the Wells Construction Company October 3, 1910; that they started the work on the building December, 1909, and they were from some time in

(Testimony of Joseph Wells.)

January the following year until well along in October of that year before the building was turned over to Mr. Sandberg; that the building is called the Kentucky Building and the one in which Mr. Sandberg did business for a long time and had his office; that although the company was in the hands of a receiver in Tacoma and in the hands of a liquidator in British Columbia, the stock-books were in British Columbia and witness had the capital stock of the company in his pocket under letter from Mr. Peterson and then came back from Vancouver and left the stock lay in his desk in Tacoma. That Mr. Sandberg did not render his statement to the Wells Construction Company until November 29, 1910.

Thereupon Mr. Peterson asked the witness Wells this question:

“Mr. PETERSON.—Q. Did you or the Wells Construction Company or anybody in its behalf ever give Mr. Sandberg anything for signing this indemnity agreement, Plaintiff’s Exhibit No. 2?”

To which evidence sought to be adduced thereby the plaintiff objected on the ground that they were estopped to show whether anything was given to Sandberg or not, and it would not be material whether anything was given or not.

This objection was overruled and the Court allowed an exception, and the witness answered, “No, sir.”

Thereupon the witness testified that the Wells Construction Company was engaged in the construction of a building in the city of Tacoma, in 1910,

(Testimony of Joseph Wells.)

and at the time the indemnity agreement in evidence was given, for Mr. Sandberg. And thereupon the witness was asked whether that had anything to do at all with the giving of the agreement, Exhibit No. 2, to which the plaintiff objected on the ground that it called for the opinion of the witness and that it was a question for the Court and the Court overruled the objection and allowed an exception. And thereupon the witness was asked whether there [159] was anything said about the company's business in the construction of a building in Tacoma in connection with Sandberg's going on the indemnity agreement and the same objection was again made and the Court made the same ruling and allowed the exception and the witness answered, "No, sir."

Thereupon there was introduced in evidence Defendant's Exhibit "A," which was the contract for construction of the building known as the Kentucky Building in Tacoma, by Wells Construction Company and Peter Sandberg and the witness was asked whether or not any changes were made in the structure covered by the contract and stated that there was to be an extra story put on the building at an extra cost of something like \$3500.

Thereupon Defendants' Exhibit "A" was offered and received in evidence and the witness stated that Wells Construction Company did not have any other business with Mr. Sandberg in 1910 than the construction of this building. Exhibit "A" is a written contract dated January 22, 1910, between Wells Construction Company and Peter Sandberg



(Testimony of Joseph Wells.)

for the erection of a seven story reinforced concrete building, at 1128 Pacific Avenue, Tacoma, Washington, for the lump sum of \$33,000, payments to be made on the 1st day of each month, upon 85% of finished work. Contract contents provides building to be completed on, or before May 1, 1910, and if not so completed, contractor to pay demurrage at the rate of \$25 per day for each day thereafter until building is completed.

Thereupon witness was shown a number of checks as follows:

Date.	By Whom Drawn.	Payee.	Amount.
Jan. 22, 1910	Peter Sandberg.	Wells Construction Co.	\$5,000.00
Feb. 12, 1910	" "	Joseph Wells	1,550.80
Feb. 12, 1910	" "	" "	5,000.00
Marked,	To apply on construction	1128 Pac. Ave. Bldg.,	
Mar. 3, 1910	Peter Sandberg.	Wells Construction Co.	4,000.00
[160]			
Mar. 17, 1910	Peter Sandberg.	Wells Construction Co.	4,000.00
Apr. 9, 1910	" "	" " "	5,000.00
" 23, 1910	" "	Joseph Wells	2,000.00
" 25, 1910	" "	Wells Construction Co.	1,000.00
May 19, 1910	" "	" " "	5,000.00
Jun. 4, 1910	" "	" " "	1,500.00
" 18, 1910	" "	" " "	1,500.00

And checks aggregating \$1,432.25, made by Peter Sandberg between April 30, 1910 and August 27, 1910, to men who furnished labor and material for Wells Construction Company for the construction of the Kentucky Building; said payments aggregating, all told, \$35,604.40, of which the witness said were payments made to the Wells Construction Company on account of the construction of said building under said contract; that said building was completed in October, 1910. Said checks were re-

(Testimony of Joseph Wells.)

ceived in evidence without objection.

Thereupon defendant offered in evidence Exhibit "C," written on a letter-head of Wells Construction Co., under date of October 3, 1910, as follows:

"Tacoma, Wash., Oct. 3d, 1910.

Mr. Peter Sandberg, Dr.

To Wells Construction Co.,	
Contract price as per agreement.....	\$33,000.00
To extra painting exterior brick work, 1130 Pac. Ave. ....	125.00
Digging and concrete work in sub-base- ment .....	739.00
Enlarging Chimney, 120 Ft. at \$2.00 per foot .....	240.00
To Labor and Material furnished in An- drews Jewelry Str. ....	200.00
To putting on one additional story .....	3,500.00
Fifteen stationery sash in halls, old build- ing .....	75.00
Total .....	\$37,879.00

[161] Cr.

By, Balance owing to Grosser for Plastering .....	\$ 777.50
By, Our portion of Sheet Metal works .....	190.70
By, To Bill of Cizek's, for rep. skylight in Langlow Building .....	17.90
By, to Credit for 16 wooden windows, @ \$5.50 Pr.	98.00

(Testimony of Joseph Wells.)

By, Lumber delivered to us at

Puyallup ..... 247.30

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\$1,331.40      1,331.40

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Balance .....\$36,547.60

Thereupon counsel for plaintiff objected to the admission of the statement in evidence upon the ground that it is not responsive to any issue in the case and cannot be received because in variance with Sandberg's written contract with the plaintiff, and thereupon the Court ruled:

"It will be admitted as tending to show the nature of Sandberg's interest in this company. It does not necessarily show that it is the only interest he has in that company, but it is one interest. When I say interest in the company, I mean the manner in which he was in one sense interested in that company."

Thereupon Mr. Peterson stated that plaintiff in its complaint alleges that Mr. Sandberg was indebted to Wells Construction Company because of the construction of this building and in satisfaction of that he executed this indemnity agreement, to which counsel for the plaintiff replied "that was of June 2d, that is why I was objecting with reference to a statement including transactions clear up to October, when the construction we are dealing with here was in June, 1910. I do not want any one misled as to my purpose."

Thereupon the Court overruled the objections to

(Testimony of Joseph Wells.)

the admission of said statement and the same was admitted and received in evidence as Defendant's Exhibit "C" and the Court allowed an exception. [162]

The witness further testified that Exhibit "C" does not contain a credit of the payments made by Mr. Sandberg on account of the building contract.

Thereupon Defendant's Exhibit "D," as follows: "Wells Construction Company. Nov. 29th—10.

In account with Peter Sandberg.

Balance due on merchandise..\$	102.95
'IOU' Joe Wells 8/2, 1910.....	30.
'IOU' Matteson .....	40.
Cash Joe Wells 12/28,1909..	30.
Labor Kentucky bldg. 40 dys.	
at \$2.50 day.....	100.
Paid Wells Con. Co., acct. con-	
<hr/>	
tract Ky. bldg. ....	35604.40
"IOU" Barton Mch. 8th, 10..	90.
Tacoma Millwork Supply Co.	
bill 8th floor.....	243.49
Two doors short at Kentucky	
Building .....	100
Windows at elevator shaft	
short .....	25.
Cleaning floors third story in	
Ky. bldg. ....	300.
Breaking skylights at Lang-	
low building .....	17.90
Switches for lights in Ken-	
tucky building .....	700.00

(Testimony of Joseph Wells.)

Wiring eighth floor, for bell	
push buttons . . . . .	200.
Ten fire doors, short. . . . .	200.
	————— \$37783.74
As per contract let. . . . .	36547.60

Balance still due me. . . . . 1236.14”

—was offered in evidence. The witness testified that it was a copy of a statement received by the Wells Construction Company from Mr. Sandberg, setting forth the credits which he claimed in connection with the construction of the Kentucky building under the contract, Exhibit “A,” and further testified that the different items therein, so far as the cash payments were concerned, were correct, but that he complained about some small personal accounts contained in the statement, without designating [163] them, to which offer in evidence the plaintiff objected upon the ground that it was collateral matter and could not be admitted to vary his contractual relations with plaintiff, and as not bearing upon the issue of the case because of the fact that Wells Construction Company made a statement to Mr. Sandberg of how much he owed the company in November and Mr. Sandberg issued to the company a statement of how much the company owed him in November, did not alter the status of the parties in June, 1910, which was the time he went into this with plaintiff and which is the time when he stated he was beneficially interested.

The Court overruled this objection and admitted

(Testimony of Joseph Wells.)

and received in evidence the statement marked Defendants' Exhibit "D" and allowed an exception.

The witness thereupon testified that in June, 1910, he was general manager of the company and that at that time the Wells Construction Company was in good standing, was solvent and had good credit and could get anything they wanted in the shape of loans at the bank and could carry on the construction of the Kentucky Building without the assistance of anybody on the outside; that the statement he signed on June 2, 1910, with reference to the application for a contract bond made to plaintiff American Surety Company of New York described the building which was under contract to Peter Sandberg as the Kentucky Building and that it was about ninety-five per cent completed; that the reason the building was not completed until November was because there was a lot of work to be done on the adjoining building; the building was not completed in June, but about ninety-five per cent completed.

The witness further testified, on cross-examination, that in June, 1910, the Kentucky Building was 95% completed; that in November, 1910, I was trying to get new parties to come into [164] the Wells Construction Company so as to get on a new financial footing, and complete the work, and carry out the contracts on hand. I took the certificates of stock of the Wells Construction Company, and went to Vancouver, B. C. The stock book of the company was in our office there. The certificates of stock, which I took with me on that trip, was the stock

(Testimony of Joseph Wells.)

that Mr. Mettler and Mr. Vergow had placed in trust with Mr. Peterson and Mr. Peer, and I requested to have it so that I could complete the transaction of financing the company.

Mr. Peterson, Mr. Sandberg and Mr. Rydstrom went with me to Vancouver. I had two certificates at that time for 124 shares each and two for one share each; that the stock-books and records of the company had never been in the hands of Mr. Sandberg or Bates, Peer & Peterson, his attorneys. All the checks which Mr. Peterson introduced in evidence were payments made to the Wells Construction Company, by Mr. Sandberg, for work done by the Wells Construction Company on the Kentucky Building. The several checks made to other parties were made at the request of the Wells Construction Company to men who performed labor for it under the contract on the Kentucky Building, and for material which went into the building under the contract. We asked Mr. Sandberg to make these payments, and charge the same to our account. Some of these checks went thru the Fidelity Trust Company Bank and some went thru the Pacific National Bank, but the Wells Construction Company had accounts at both banks.

The Kentucky Building is the one in which Mr. Sandberg had his office, and did business for a long time. I did not return the capital stock of the Wells Construction Company to Mr. Peterson. It has been in my possession ever since, in my desk at home.

The Wells Construction Company and Mr. Sand-

(Testimony of Joseph Wells.)

berg had some [165] controversy over the settlement of the account for the construction of the Kentucky Building, and the statement rendered by the Wells Construction Company to him, and the statement rendered by Mr. Sandberg to the Wells Construction Company arose out of that controversy.

**Testimony of Simon Mettler, for Defendants.**

SIMON METTLER was thereupon called as a witness on behalf of the defendants and among other things testified that during the year 1910, the Wells Construction Company was engaged in the construction of a building for Peter Sandberg known as the eight-story building called the Kentucky Building in Tacoma; that he was an officer of the corporation along in the fall of 1910, in September and October. The witness was then asked the following questions and testified as follows:

“Q. What is your recollection as to the amount that had been paid at that time when you had that conversation with Mr. Sandberg?

A. Why, I had asked him for five thousand dollars. We were pressed for money and he says, ‘Why, you have not got that much coming,’ and I says, ‘Well, I am not positive,’ because I was negligent in looking after the books, and Mr. Lund kept the books for us, and I says to Mr. Sandberg, ‘What in your opinion have you paid,’ and he says, ‘I think I have paid you in the neighborhood of thirty-two thousand dollars,’ and that was practically to my recollection all except the extra that was to be paid, that is the extra for the top story.



(Testimony of Simon Mettler.)

Q. You did not have the books at that time?

A. No, sir.

Q. Or Mr. Sandberg either?      A. No, sir.”

The witness then testified that he was one of the incorporators of the company and that it succeeded to the business of the Tacoma Bridge Company in the early spring of 1910. Thereupon the witness was asked this question:

“Q. You are representing the company,—I will ask you [166] if you represented the company in connection with seeing Mr. Sandberg about getting him to sign this indemnity to the American Surety Company on which this suit is based?

A. What is the question?

Q. I will ask you whether or not you were representing the Wells Construction Company in obtaining Mr. Sandberg's signature to this indemnity contract, Plaintiff's Exhibit No. 2, which is the indemnity agreement given to the Surety Company in connection with the Powell River Contract?

A. Yes, I asked Mr. Sandberg in behalf of our company.

Q. Was there anything said about the relations or business of the Wells Construction Company with Mr. Sandberg in building this building in connection with this matter?

Mr. BRISTOL.—I object to that upon the ground that whether or not there was would be immaterial, and if there was it could not be received in evidence because it would be violating a written contract, and

(Testimony of Simon Mettler.)

there being no person present at this conversation representing the American Surety Company, it would not be binding.

The COURT.—That might be true as far as Mr. Sandberg is concerned, but there remains a question of whether it would be as regarding the wife and communtiy. The objection will be overruled. Exception allowed.”

And thereupon the witness was permitted to answer the question over the plaintiff’s objection and did answer, “No, sir.” Thereupon the following question was asked the witness:

“Q. Did Mr. Sandberg receive anything from you or the Wells Construction Company for signing this agreement?”

Mr. BRISTOL.—I object to that upon the ground that it is entirely immaterial, and in order to get the matter before your Honor in this connection, that the estoppel was overlooked by your Honor in my last objection, and I do not wish your Honor to overlook it here. If you will consider it, that whether there was anything paid or received by Mr. Sandberg or not is immaterial; this contract with us shows that he is beneficially interested and is estopped. We have executed this contract upon the basis of that statement of his, and the wife is estopped and he is estopped, by well considered cases in the Supreme Court of the State of Washington.

The COURT.—The main point which will have to be [167] decided in the case is whether the wife is estopped.

(Testimony of Simon Mettler.)

Mr. BRISTOL.—As a matter of law my objection is this: That when the husband acts as Mr. Sandberg acted, she cannot come back and offer this evidence out of Mr. Mettler's mouth or that of anyone else merely to clear the community.

Objection overruled. Exception allowed.

Mr. BRISTOL.—May I have my objection to all of this so as not to interrupt?

The COURT.—Yes, it will be considered as going in over your objection.

(Question read.)

A. No, sir.

Q. Did Mrs. Sandberg receive anything?

A. No, sir.

Q. From you or the Wells Construction Company for the execution of this agreement?

A. None whatever.

Q. Did Mr. Sandberg have any concern or any interest in this contract with the Powell River Paper Company? A. Absolutely none.

Q. Mr. Mettler, during the month of June, 1910, and immediately before and after that date, what was the financial condition of the Wells Construction Company?

Mr. BRISTOL.—That is the same matter I objected to this morning and I make the same objection now.

Objection overruled. Exception allowed.

A. The financial situation was in good shape then at that time."

Thereupon the witness testified that the financial

(Testimony of Simon Mettler.)

condition of the Wells Construction Company was good, that it could have completed the Kentucky Building without assistance from anybody and that it was not necessary that Sandberg sign the agreement, Plaintiff's Exhibit No. 2, to enable the Wells Construction Company to carry out the contract of the Kentucky Building. Thereupon the following question was asked the witness: [168]

“Q. Who were the stockholders of the corporation during that time?

Mr. BRISTOL.—I object to that as not the best evidence, the corporate records not having been produced or accounted for.

The COURT.—Well, it is accounted for so far as the other witness, but this witness, being an officer of the company might be able to tell more about it.

Mr. PETERSON.—Q. Do you know where the books and records of the Wells Construction Company are? A. No, sir.

Q. Have you known since the company became insolvent in 1910?

A. I have never had the slightest idea.

Q. Supposing you were requested now to say if you could produce them, would you have any idea where to go to get them?

A. No, sir, absolutely none.

Q. Do you know who the stockholders of the corporation were during its existence?

A. Yes, from my recollection there was only four of us, Mr. Wells, Mr. Vergowe, myself and Mr. Lund.

Q. Were Mr. or Mrs. Sandberg or either of them

(Testimony of Simon Mettler.)

ever stockholders in that corporation?

Mr. BRISTOL.—I object to that as not the best evidence, and that it is a question which involves a matter which cannot be produced out of the mouth of this witness under any theory of this case and that it is incompetent.

The COURT.—The objection is overruled, but all that his answer would amount to in the negative would be that he did not know of his having been a stockholder at any time. It is simply asking for the negative.

A. No, sir, they never had any stock in it.

Q. Were they ever interested in any way in the corporation?

Mr. BRISTOL.—I object to that on the ground that this witness cannot be asked whether they were interested or not.

The COURT.—It amounts to whether he knows or not, that is all.

A. They had absolutely nothing to do with it.

Q. Did they ever have any dealings with it outside of the company building the building over here?

A. No, sir. [169]

Mr. BRISTOL.—Did they ever have any dealings with what, with the Wells Construction Company? Do I understand you to answer that Mr. Sandberg never had any dealings with the Wells Construction Company except this building over here?

A. Not previous to that.

Q. Previous to what?

A. To our building that building.

(Testimony of Simon Mettler.)

Q. Not previous to the construction of the Kentucky Building.

Mr. PETERSON.—Q. Did they ever have anything afterwards to do with it excepting the signing of this bond and the endorsement of some notes and one thing and another which Mr. Sandberg finally sued you on? A. That is all.

Q. Did you ever agree to pay or compensate or give Mr. or Mrs. Sandberg anything for Mr. Sandberg's signing of the agreement, Plaintiff's Exhibit No. 2?

Mr. BRISTOL.—I object to that upon the ground that it is absolutely immaterial whether he says that he agreed to do it or not; it would not make any difference what he agreed to do.

The COURT.—Do you contend that there is more in this question than the last one in which you asked him substantially the same thing?

Mr. PETERSON.—I asked him if there was ever any agreement to give him anything.

Objection overruled. Exception allowed.

A. None whatsoever."

On cross-examination this witness testified that he had asked Sandberg to go to Vancouver to endorse a lot of notes up there for Wells Construction Company during the summer of 1910 and before the completion of the Kentucky Building.

Thereupon the witness was asked this question:

"Q. Didn't you testify in the Molson Bank case in relation to this same matter as follows:

'Q. What are the circumstances leading up to

(Testimony of Simon Mettler.)

that? A. That he signed the notes with us? Q.

Yes. A. Well, because we was pressed for money—' that is, speaking of signing the notes and doing the other things. You were [170] asked by Mr. Peterson, 'What are the circumstances leading up to

that? A. That he signed the notes with us? Q.

Yes. A. Well, because we were pressed for money, very seriously and we tried to get money from the bank—Molsons Bank in Vancouver, B. C.—and I was over there once or twice before trying to get the money, and finally the answer was I should have another strong man to back me up and then possibly we could make arrangements to get money from them. They knew my record about that time and that I was pretty strong. They knew that the company was not worth an awful lot, and they said they would probably help us out if we could get another man; so I came back and induced Mr. Sandberg to go over there, after some coaxing him and talking things to him.' Did you so testify?

A. I might have used that particular word.

Q. And the question I have read to you, is that substantially your testimony on that occasion?

A. Yes, sir."

Thereupon the witness was asked this question:

"Q. Your fiscal year runs in January, and ours runs in July. I got them mixed. Now, getting back to your knowledge that Mr. Peterson talks about as an officer of the company: I understand you to say it was not until October or late in Sep-

(Testimony of Simon Mettler.)

tember that you and Mr. Sandberg had the talk then about enabling you to get something from him on account of the building, have I got that right?

A. Yes, sir."

Thereupon the witness was asked this question:

"Q. Was your receivership in Tacoma before your liquidation in Vancouver, or which way was it?

A. I could not answer that.

Q. What is your best recollection of it?

A. Ordinarily speaking, about the last part of October,—no, I think it was in November, I threw up the sponge.

Q. Now, watch: Talking about this sponge throwing and letting everything go, isn't it a fact that previous to that Mr. Sandberg required yourself and Mr. Vergowe and your respective wives to indemnify him, to convey a lot of property to him?

A. Yes, I think there was something like that."

[171]

Thereupon the witness was asked this question:

"Q. Now, in this complaint, and for the purpose of advising you as to your arrangement, and why I asked you about whether you were a strong man in the company or not, I will call your attention to this allegation made by Mr. Peter Sandberg, in the case in which he sued you: 'That on or about said last date above referred to, to wit, the — day of August, A. D. 1910, the defendants, Simon Mettler and Anna Mettler, his wife, and said George E. Vergowe and his wife and said Joe Wells and his



(Testimony of Simon Mettler.)

wife, and the Wells Construction Company, a corporation, entered into an oral agreement with plaintiff, wherein and whereby in consideration of plaintiff's endorsing certain notes, bonds and guarantees, hereinafter particularly referred to, to enable said Wells Construction Company, a corporation, in which said persons were interested as stockholders, to get credit with which to raise money to carry on its said business of contracting and constructing buildings and improvements, for which said Wells Construction Company then held contracts, it was agreed that they, said Vergowe and wife and said Wells and wife, Simon Mettler and Anna Mettler, his wife, and Wells Construction Company, a corporation would convey by deeds of conveyance certain real property in Pierce County, Washington, held and owned by them to fully secure and indemnify plaintiff on account of his endorsements of said notes, bonds, guarantees and other commercial paper to enable said Wells Construction Company to obtain credit and money to carry on said business, and in accordance therewith said George E. Vergowe and wife and said Joe Wells and wife and said Wells Construction Company, a corporation, executed their deeds of conveyance to the property to be conveyed by them, to wit, the following lands and premises all in Pierce County, Washington,' and so on. Now, in view of your relations with the company and with your recollection refreshed from that allegation, state what you meant when you said to Mr. Peterson that there was no consideration given to Mr. Sand-

(Testimony of Simon Mettler.)

berg for what he did in consideration of the agreement made with him about what he did with the Wells Construction Company.

A. There was not at the time when I asked him about it.

Q. You did not mean to hold back anything? You probably had forgotten about this? A. I did.

Q. The fact is you fellows did have an arrangement with him? A. Not at that time.

Q. Well, I know, but whether you made it at the minute that he did, as a matter of fact, he demanded that the arrangement be made, and you acceded to it? A. Could you blame me?

Q. Well, doesn't he tell the real truth about it?

The COURT.—If this lawsuit has not been determined, the witness might not be free to answer.

[172]

The WITNESS.—What is it you want to know?

Q. How, now, in view of you having your recollection refreshed with reference to that agreement that he alleges was made there, can you say to Mr. Peterson that there was nothing between you and Mr. Sandberg in consideration for his signing those agreements.

A. Absolutely not at the time I asked him for it.

Q. I know, but why did you give him deeds and indemnity afterwards, why did you and Mr. Vergowe and Mr. Wells give him deeds and indemnity afterwards?

A. Because I wanted to play fair with the man."

Thereupon the witness was asked this question:

(Testimony of Simon Mettler.)

“Q. Then Mr. Sandberg’s statement in this complaint as to what the agreement was between you and Mr. Vergowe and Wells and himself is not correct, is that right?     A. I do not know.

Q. You do not know?     A. No, sir.

Q. Why did you say that in view of your former answer?

A. Because I do not know there was anything like that (indicating paper) in existence.

Q. Why did you give the deeds?

A. What did I care who got the stuff after I was broke.”

Thereupon there was an argument between counsel as to the effect of the complaint by Peter Sandberg against Simon Mettler and others and colloquy between Court and counsel as to the application of the testimony, whereupon counsel for the plaintiff stated: “We are in the unfortunate position of pursuing one of two points, either we are pursuing a will-o’-the wisp, the deeds not being recorded, or else that complaint when it was filed, where Peter Sandberg says it was executed, either they are held and not recorded,” whereupon the Court stated: “is it not true that if your position on the law is correct, the giving of this indemnity makes such a transaction as to bind wife and community, if you show that Mr. Vergowe gave one deed, you would get as much advantage as though you brought in a bushel of deeds.”

I did not deed or convey any property to Mr. or Mrs. Sandberg, or either of them, or give them any-

(Testimony of Simon Mettler.)

thing to induce Mr. Sandberg to sign the indemnity agreement, or any other papers that he signed for me or the Wells Construction Company. The only papers which I did sign is the paper marked Plaintiff's Exhibit No. 9, offered thereon, and received in evidence as follows: [173]

**Plaintiff's Exhibit 9—Agreement, November 26, 1910, Between Kentucky Liquor Co. et al. and Simon Mettler.**

“THIS AGREEMENT, Made and entered into this 26th day of November, A. D. 1910, between THE KENTUCKY LIQUOR COMPANY, A Washington corporation, THE WELLS CONSTRUCTION COMPANY, a Washington corporation, GEORGE VERGOWE and CARRIE VERGOWE, his wife, parties of the first, and SIMON METTLER, party of the second part.

WITNESSETH: Whereas the Wells Construction Company has heretofore conveyed by deed of conveyance to the Kentucky Liquor Company, a corporation, as trustee for Peter Sandberg and the Bank of Vancouver, a British Columbia Corporation, and the Molsons Bank, a British Columbia corporation, both of Vancouver, B. C., a certain real property in Pierce County, Washington, described as follows, to wit:

Dia. Twelve (12), Lot Fifteen (15), Section Eleven (11), Township Twenty (20), Range Three (3) East; Lots Five (5) to Fourteen (14), Block 8858, Indian Addition; Lots Eighteen (18) and

Nineteen (19), Block 8050, Indian Addition; Lots Nine (9) to Twenty-six (26) Block 8150, Indian Addition; Lots Nineteen (19) to Twenty-six (26), Block 8249, Indian Addition; North  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , Sec. 14, Twp. 20, Range 3 E.

And whereas George Vergowe and Carrie Vergowe, his wife, have heretofore transferred and conveyed by deeds of conveyance to Kentucky Liquor Company, a Washington corporation, as trustee for Peter Sandberg and the bank of Vancouver, a British Columbia corporation, of Vancouver, B. C., and the Molsons Bank, a British Columbia corporation, of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to wit:

The north thirty (30) acres of the Northwest quarter ( $\frac{1}{4}$ ) of the Northwest ( $\frac{1}{4}$ ) of Section Thirteen (13), Township Twenty (20), Range Three (3) East; also the Northwest quarter ( $\frac{1}{4}$ ) of the Southwest quarter ( $\frac{1}{4}$ ) of the Northwest quarter ( $\frac{1}{4}$ ) of the same Section, Township and Range, which said conveyances by said Wells Construction Company and George Vergowe and Carrie Vergowe, his wife, of said real property above described was made for the purposes and given as collateral security for the payment of certain indebtedness of the Wells Construction Company, to wit:

A note for the sum of Twenty-five Thousand (\$25,000) Dollars, made by the Wells Construction Company to said Bank of Vancouver, dated at Vancouver, B. C.,——— 1910, due ninety days after date.

A note for Fifty-five Thousand (\$55,000) Dollars,

made by the Wells Construction Company to the said Molsons Bank, a corporation, dated at Vancouver, B. C., ——— 1910, and further [174] to indemnify and save harmless said Peter Sandberg against liability as endorser of said notes of said Bank of Vancouver and said Molsons Bank, a corporation, and further to indemnify said Peter Sandberg against liability as surety on said contract bonds of said Wells Construction Company, as follows:

One to the Powell River Paper Company, Ltd., in the principal sum of Twenty-five Thousand (\$25,000) Dollars; One to the Metropolitan Building Company, Ltd., in the principal sum of Twenty-seven Thousand (\$27,000) Dollars; One to the City of Vancouver in the principal sum of Ten Thousand (\$10,000) Dollars; One to the Pacific Investment Company, Ltd., in the principal sum of Three Thousand (\$3000) Dollars;

And whereas Simon Mettler, above named, is the holder of demand promissory notes of the said Wells Construction Company amounting to Seventy-nine Thousand, Five Hundred Dollars (\$79,500), besides interest;

And whereas said Mettler is the holder of one share of the capital stock of said Wells Construction Company, a corporation;

And whereas said Wells Construction Company has expended and invested large sums of money in the performance of certain contracts entered into by it with said Powell River Paper Company, Ltd., Metropolitan Building Company, Ltd., City of Vancouver, a municipal corporation, and Pacific Invest-

ment Company, Ltd., and numerous other persons, which it is necessary to carry to completion to save said Wells Construction Company from becoming insolvent.

And whereas said Simon Mettler is desirous of withdrawing from said corporation, and relieving the same from liability on account of the indebtedness owing him from said corporation in consideration of said corporation carrying on its said business and paying off and discharging its creditors whose claims and accounts said Peter Sandberg has become surety for.

IT IS NOW THEREFORE AGREED, between said parties, that the Kentucky Liquor Company, a corporation, trustee as aforesaid, will hold the title to the lands and premises hereinbefore described for the purposes hereinbefore referred to until such time as it shall be necessary to apply and exhaust the same for the purposes for which it was conveyed as hereinbefore set forth.

That the Wells Construction Company will apply and exhaust all of its property and assets in payment and discharge of its said obligations on which said Peter Sandberg is endorser, or has become liable in any manner whatever, and that thereafter said Kentucky Liquor Company, a trustee, shall apply by conversion or otherwise, as much of said property above described as may be necessary to satisfy and discharge [175] the balance, if any, of said claims on which said Peter Sandberg may in any manner be liable, and the surplus, if any, of said property remaining in the hands of said Ken-

(Testimony of Simon Mettler.)

tucky Liquor Company, trustee, after fully paying and discharging all of said claims and demands of said bank of Vancouver and the Molsons Bank and Peter Sandberg shall be conveyed by proper deeds of conveyance to Simon Mettler.

IN WITNESS WHEREOF, The Wells Construction Company, a corporation, and the Kentucky Liquor Company, a corporation, have by resolutions of their respective Board of Directors, duly asked and recorded, authorized their president and secretary, respectively, to execute these presents and attach the corporate seals of said corporations, respectively hereto.

IN WITNESS WHEREOF, said parties have hereunto set their hands and seals at Tacoma, Washington, this 26th day of November, A. D. 1910.

Signed, Kentucky Liquor Company, a corporation, by Peter Sandberg, its President, Attest, P. H. Lack, Secretary. Wells Construction Company, a corporation, by Charles T. Peterson, its President. Attest, Newton H. Peer, Secretary. Geo. E. Vergowe. Simon Mettler."

Thereupon the witness was asked this question:

"Q. Now, Mr. Mettler, I show you in that connection what I presume is the other agreement you refer to and ask you to look at it and identify it and say whether or not it bears your signature?

A. Yes, it does.

Q. That bears the date of the 20th of June, 1910?

A. Yes, sir.

Q. In connection with your testimony in answer



(Testimony of Simon Mettler.)

to Mr. Peterson's question yesterday as to whether or not any previous arrangement or agreement had been entered into, either you or the Wells Construction Company and Peter Sandberg, previous, do you understand me, to your going to Vancouver, and having those transactions in regard to this bond here, will you be kind enough to tell me how it came, in view of your answer that there was no such arrangement, that that agreement was executed?

Mr. PETERSON.—If the Court please, defendants object on the ground that it is really not proper cross-examination.

The COURT.—(Addressing the witness.) I take it you are of foreign birth. Were you born in this country?

A. No, sir, I am of foreign birth. [176]

The COURT.—All of these complicated involved questions constantly put the witness at a disadvantage. When you can, ask single questions and get his answer.

Mr. BRISTOL.—I bow to your Honor's suggestion, and think that the witness has shown himself very resourceful in this matter. He testified that there were no arrangements between himself and the Wells Construction Company relative to the giving of this indemnity agreement. Now, we have disclosed two agreements, and I submit these to the Court. I ask to have this last one identified and offer it in evidence as Plaintiff's Exhibit No. 10.

Mr. PETERSON.—The defendant Matilda Sandberg objects on the ground that it is incompetent,

(Testimony of Simon Mettler.)

irrelevant and immaterial and tends to prove no issue in this case.

Objection overruled. Exception allowed.

The WITNESS.—I will state, if I am allowed, why it came about that I testified that way, because I really never remembered any more that this particular agreement was in existence. That is nearly five years ago.”

Thereupon Defendants' Exhibit No. 10, as follows:

**Plaintiff's Exhibit No. 10—Agreement, June 20, 1910, Between Wells Construction Co. and Peter Sandberg.**

“AGREEMENT.

THIS AGREEMENT made and entered into this 20th day of June, 1910, between the Wells Construction Company, a corporation, of Tacoma, Washington, and Peter Sandberg of the same place,

WITNESSETH: That whereas the Wells Construction Company has heretofore on the — day of —, 1910, entered into a contract with the Powell River Company of Vancouver, B. C., for the construction of a dam and canal on the Powell River, B. C., for a price approximating \$175,000 and

Whereas the said Wells Construction Company has made application to the American Surety Company of New York to become surety on the bond of the said Wells Construction Company in the sum of \$25,000 for the faithful performance by the said Wells Construction Company of the conditions of the said contract, and

Whereas the said American Surety Company of New York refuses [177] to become surety upon the said bond of the said Wells Construction Company without some other person signing the application with the said Wells Construction Company for the said surety company to become surety upon the said bond, and

Whereas the said Peter Sandberg of Tacoma, Washington, has agreed to sign his name with the said Wells Construction Company on the application for the said bond agreeing to indemnify the said surety company in case it should be held liable on the said bond,

Now, Therefore, in consideration of the said Peter Sandberg signing the said application with the said Wells Construction Company for the said surety company to become surety upon the said bond, the said Wells Construction Company agrees to re-pay to the said Peter Sandberg any money or moneys which he may be required to pay to the said American Surety Company of New York by reason of his signing the said application with the said Wells Construction Company for the said surety Company to become surety upon the said bond and to hold the said Peter Sandberg harmless by reason of his signing the aforesaid application.

WELLS CONSTRUCTION COMPANY.

By SIMON METTLER,

President.

By JOE WELLS,

Secretary.

(Testimony of Simon Mettler.)

We individually agree to hold said Peter Sandberg harmless by reason of signing said application for a bond above mentioned.

SIMON METTLER.

JOE WELLS."

Was over the objection of defendant, Matilda Sandberg, that it was incompetent, irrelevant and immaterial, admitted in evidence.

Thereupon the witness was asked this question:

"Mr. BRISTOL.—Q. You remember I remarked to you last night after the court adjourned that I assumed you were mistaken, and I thought you were mistaken when you testified. There was no other disposition then to get at the real facts. Now, you may make any explanation you please? [178]

A. You see, when I went broke and threw up the sponge, I went away. That was nearly five years ago, and I gave it all up. I did not care where the money went that I had accumulated. You know how a man feels. That is an awful recollection to put into my mind. You know how a fellow feels.

Q. Now, will you be kind enough, Mr. Mettler, showing you Plaintiff's Exhibit No. 10, under date of June 20, 1910, to tell me to the best of your recollection where and the circumstances under which that was executed?

Mr. PETERSON.—I submit if the Court please that the agreement speaks for itself.

Mr. BRISTOL.—I am not trying to do anything with the agreement.

Objection overruled. Exception allowed.

(Testimony of Simon Mettler.)

A. I could not recall anything except that I signed it.

Q. Do you remember where and the circumstances under which you signed it?

A. Why, not any more than this instrument shows itself.

Q. Whose office were you in, if anybody's?

A. I could not remember that.

Q. Who if anybody brought the agreement to you to sign it, or did you go and get it?

A. Oh, I presume we were all together.

Q. Who? A. Mr. Wells and myself.

Q. Who else? A. And Mr. Sandberg.

Q. And who else? A. I could not tell you.

Q. Nobody but you three?

A. I am not quite positive, but I think Mr. Lund drew this agreement.

Q. Who was Mr. Lund, please?

A. Mr. Lund was a member of our company.

Q. He was a member of the Wells Construction Company? A. Yes. [179]

Q. What office did he hold, please, if you recall?

A. I am not positive whether— (interrupted).

Q. Is this the Mr. Lund you mean (indicating)?

A. That is the gentleman.

Q. The lawyer Lund, you mean? A. Correct.

Q. He is the one who brought that agreement to you to sign?

A. Somebody must have drawn it; I think it was him.

Q. Do you recall whether it was in his office that

(Testimony of Simon Mettler.)

you signed it? A. That I could not say.

Q. Or Mr. Sandberg's office?

A. Well, it was somewhere in Tacoma I presume. It is dated here.

Q. Well, all you recall about it is what you have said? A. Yes, sir."

Thereupon the witness was asked this question:

"Q. I show you Exhibit 9 dated the 26th day of November, and ask you the same question, where and in whose presence did you sign that agreement, if you recall?"

Mr. PETERSON.—Defendants object on the grounds that it is not proper cross-examination, incompetent, irrelevant and immaterial.

Objection overruled. Exception allowed.

A. Well, this is one of the things that I do not remember so clearly.

Q. Will you please look at the signatures on that paper and I will call your attention to the fact that on the last sheet where the signatures are and above yours and Mr. Sandberg's are the signatures of the officers of the Wells Construction Company at that time, Mr. Charles T. Peterson as president and Mr. Newton Peer, and I will ask you whether you signed your name at that time, if you recall now, in their presence, or whether you signed it some time later, or what the circumstances were?

A. I presume I signed it right then and there.

Q. Was Mr. Sandberg present?

A. Why, I think he was."

The circumstances leading up to the conveyance of

(Testimony of Simon Mettler.)

the property [180] referred to in the agreement, Exhibit 9, were about as follows:

The Wells Construction Company wanted to get some money from a bank at Vancouver, and got Mr. Sandberg to go with us to endorse the notes. Mr. Dewar, the manager of the bank at Vancouver, said to Mr. Sandberg, "Why don't you get some surety for putting your name on those notes." Sandberg said, "No, I would rather for you to get the security." The bank let us have \$25,000, and previously loaned the company \$10,000. It was understood that we were to come back and execute deeds of the Wells Construction Company to the Bank of Vancouver. We executed a couple of deeds in blank, and returned to Vancouver. In the meantime, Mr. Dewar consulted his lawyer, and when we brought the deeds to the bank, said that the bank could not take them as it was not safe for an alien to hold property in the State of Washington. Mr. Dewar suggested that the deeds be made to Mr. Sandberg individually because he said he looked to Mr. Sandberg to get the money. Mr. Sandberg says, "No, I do not want any property from those people in my name, we can put it in the name of the Kentucky Liquor Company, to protect the bank, and I think that was done.

These two written agreements, Exhibits 9 and 10, are the only agreements I ever entered into with Mr. Sandberg to obtain his signature to the Surety Company, and I never agreed with him orally, to give him anything. Mr. Sandberg was interested in the

(Testimony of Simon Mettler.)

Kentucky Liquor Company so far as I knew. The property of Wells Construction Company was not to be conveyed as security for the Molson's Bank, but was for the express purpose of protecting the Bank of Vancouver.

**Testimony of H. P. Burdick, for Defendants.**

Thereupon H. P. BURDICK testified that he was an attorney, practicing at Tacoma, Washington, during the years 1910 and 1911, and was the attorney for the Mettlers in the action brought by Peter Sandberg against Simon Mettler and his wife, and Carl Mettler, to enforce an oral agreement in regard to certain real property in [181] Pierce County, Washington, being the action referred to in Exhibit No. 7.

At the time the Simon Mettler bankruptcy was closed in the Federal Court, I had an agreement with Mr. Peterson, attorney for the trustee, that the case of Sandberg against Mettler should be dismissed, and the *lis pendens* discharged, and the entire matter wiped out. That agreement was carried out by the exchange of deeds. Shortly after that suit was brought, a petition in bankruptcy was filed against the Mettlers, and the suit was abandoned.

In answer to the question whether that agreement was carried out, the witness answered:

“Yes, so far as the bankruptcy case was concerned, that was finally closed up and deeds exchanged between Carl Mettler and the Molson's Bank of Vancouver, B. C., and the Bank of Vancouver, as well,



(Testimony of H. P. Burdick.)

and there was a petition in bankruptcy afterwards filed against Simon Mettler.”

But the witness did not know whether formal order of dismissal had ever been entered.

**Testimony of Peter Sandberg, in His Own Behalf.**

Thereupon PETER SANDBERG testified in person as follows:

That he was never a stockholder in the Wells Construction Company and had no interest in it, either directly or indirectly, and did not participate in any way in the profits of the company, and thereupon the witness was asked the following questions, the following objections were made and the following rulings made by the Court and the following exceptions taken:

“Q. Did you participate in any way in any of the profits of the corporation?”

Mr. BRISTOL.—Your Honor understands, I take it, that of course, under the state of the pleadings here and the points already submitted to your Honor, that this testimony raises this legal point: We are maintaining for the plaintiff, that the witness himself, the defendant, cannot be permitted [182] in view of its agreement with us to testify orally in contradiction thereto, and I understand the Court expressed himself that while he understood that point the evidence will be allowed to go in until the final argument. We are objecting to this testimony on the ground that he cannot be heard now, give any testimony against that agreement plead in the pleadings, and in our reply, which was

(Testimony of Peter Sandberg.)

part of our indemnity agreement with him, and that that estoppel runs against the defendant Matilda Sandberg as well as himself.

The COURT.—The objection will be overruled and final determination reserved until the final argument.

Exception allowed.

Mr. PETERSON.—“Mr. Sandberg, did you ever receive any property or any consideration from Simon Mettler or Joseph Wells or the Wells Construction Company or anybody—(interrupted).

A. No, sir.

Q. Just a minute—for your executing and affixing your name to Plaintiff’s Exhibit 2, being an indemnity agreement with the American Surety Company?

Mr. BRISTOL.—Now, at this time I object to this testimony further on the ground that it cannot be received and is incompetent for the reason that Exhibits 9 and 10 are written documents and speak for themselves, to which this witness himself was a party, and confessedly acting in connection with the community at the time, and that he cannot be heard to state anything on this witness-stand verbally in modification of or denial or alteration thereof.

The COURT.—Same ruling. Exception allowed.

Mr. BRISTOL.—And in order not to interrupt the Court again, allow me a motion to strike out such testimony as you elicited from Mr. Sandberg previous to my objection.

(Testimony of Peter Sandberg.)

The COURT.—Motion denied; exception allowed.

A. No, sir.”

Thereupon the witness was asked the following questions:

“Mr. PETERSON.—Q. Mr. Sandberg, calling your attention to the operations of the Wells Construction Company in Vancouver, I will ask you whether or not you were present at the Bank of Vancouver in British Columbia in company with Simon Mettler and others connected with the Wells Construction Company regarding the endorsement of some notes of the Wells Construction Company in the latter part of 1910?

A. In the bank of Vancouver?

Q. Yes. A. Yes. [183]

Q. Mr. Sandberg, you may state whether or not any conversation took place at the bank regarding the conveyance by the Wells Construction Company and Vergowe of certain property held by them as indemnity or collateral security?

A. Well, I went up there with Mettler. Mettler asked me to go up there and I went into the bank and he wanted to borrow some money up there, the Wells Construction Company wanted to borrow some money up there, and it was a very small bank. They said they could not loan any money; they had just started the bank, and they said they did not like to loan them any money without collateral security, so the Wells Construction Company, Mettler and Joe Wells and Vergowe said they had some property belonging to the Wells Construction Company, and

(Testimony of Peter Sandberg.)

also Joe Wells and Vergowe had property of their own, and Dewar insisted upon having some deeds to that property, and told them to have some deeds made out, and they had the deeds made out in blank, and they went up there and turned the property over to Dewar—to the Bank of Vancouver—and he had been consulting his attorney up there, and he said they did not like to hold any property in this State in their own name, so he said to me, ‘You had better hold that property in your name in trust for us,’ and I said I did not want to do that. He said, ‘Why,’ and I said, ‘Why, if that property has to be conveyed, I will have to go to my wife and sign those deeds over. I do not want to do it,’ I says. I says, ‘put it in anybody else’s name,’ and so he said, ‘Well, any one you know who will hold it for us is all right,’ so I said, ‘You can take it in the name of the Kentucky Liquor Company,’ and that was understood, and their bookkeeper—Frank Latham was the notary on these deeds, but he could not do it up there, so he brought the deeds back here and filled in the name of the Kentucky Liquor Company as trustee for the Bank of Vancouver, and it was recorded. Then later on Dewar—some objection was made to the Kentucky Liquor Company holding that property, being it was a corporation, and that they could not hold the property in trust for the bank, and I think that matter was discussed in your office and I do not remember if Dewar was there or who was there, so the property was transferred to Elmer Hayden of Hayden & Langhorne of this city for the

(Testimony of Peter Sandberg.)

bank, and then later on the bank foreclosed on the property and disposed of the property.

Q. Now, Mr. Sandberg, you may state whether or not all of this property, if you know, was conveyed to Mr. Hayden by the Kentucky Liquor Company?

A. Yes, every piece of it.

Q. I mean all of the property described in Plaintiff's Exhibit 9?

A. Every bit of property the Kentucky Liquor Company had in trust for the bank was signed over to him.

Mr. BRISTOL.—That is to Mr. Hayden as successor, as trustee?

Mr. PETERSON.—Yes.

Mr. BRISTOL.—About when was that? [184]

Mr. PETERSON.—That was about a month or two, and I think—(interrupted).

Mr. BRISTOL.—Sometime about the first of the year 1911.

Mr. PETERSON.—That is my recollection of it.

Mr. BRISTOL.—Since that time the trustee went on and foreclosed for the parties and distributed the stuff.

Mr. PETERSON.—Mr. Hayden went along and foreclosed for the bank there alone.

Q. Now, Mr. Sandberg, did you get any of that property?

Mr. BRISTOL.—I object to that on the ground that it is immaterial.

Objection overruled. Exception allowed.

A. No, sir.

(Testimony of Peter Sandberg.)

Q. Did you get any proceeds of it in that foreclosure suit?     A. No, sir.

Q. Did you ever have possession of any of that property?     A. No, sir.

Q. Did you ever get any profits out of it in any shape, form or manner?

Mr. BRISTOL.—I object to that.

Objection overruled. Exception allowed.

A. No, sir.

Q. Did the Kentucky Liquor Company ever get any property or proceeds out of the property?

Mr. BRISTOL.—Same objection.

The COURT.—Same ruling. Exception allowed.

A. No, sir.

Q. Who finally took all of that property under that arrangement that was made there, the deeds?

A. Elmer Hayden.

Mr. BRISTOL.—I do not know whether I am making myself clear or how sure that my point is right. I direct the Court's attention respectfully to this proposition of law: The Supreme Court of the State of Washington holds in a long line of cases that it is quite immaterial whether there are any proceeds or profits or results of any kind received by the community or by the individuals composing it, and that being a rule of property, I understand under the list of cases to be the rule of property [185] in this court, and therefore it is immaterial and incompetent whether Mr. Sandberg received any proceeds, profits or benefits of any kind.

The COURT.—I am clear upon that, but it is not

(Testimony of Peter Sandberg.)

clear that this would be the only effect of his evidence. Objection overruled; exception allowed."

At the time I married Mrs. Sandberg, I had two small cottages, worth about \$1,000. There was a \$600 mortgage on them. All of the property described in *Mr. Sandberg's* answer was acquired by us since we were married. I never inherited any property, nobody ever gave me any. I acquired the property at different times by purchase. I sold the two lots on I Street, and spent the money, never keeping any separate account of it.

On cross-examination this witness testified that the contract Mr. Peterson introduced in evidence designated as Defendant's Exhibit "A," speaking of the witness himself, comprehended the building and property known as the Kentucky Building in Block 1104, Lot 13, Tacoma, and was part of the community business witness and his wife had always been conducting; that Mr. Peterson and Mr. Peer became president and secretary of the Wells Construction Company about the time of the execution of the instrument, Exhibit 9, November 26, 1910, and that Mr. Newton Peer and Major Bates had been his attorneys for practically twenty-five years, and that the witness recalled that the agreement of November 26, 1910, was talked over two or three days before when he was present; that the officers of the Wells Construction Company resigned; that Mr. Peter and Mr. Peterson did not take over the contract of the Wells Construction Company for him; that he was up *on* Vancouver three or four times and that

(Testimony of Peter Sandberg.)

the last trip was the November 26th trip; that the stock of the Wells Construction Company was turned over to Peer and Peterson at the time the instrument was made and that it may have been talked over three or four days before to get themselves organized and then the stock was turned over because witness [186] remembered particularly that Mr. Lund was up in the office of the building known as the Kentucky Building at the time where the Wells Construction Company had their office; that Mr. Lund turned over his share to Joe Wells and Vergowe and Mettler turned over their stock to Peterson and Peer as trustee for the Wells Construction Company, and the witness knew it was two or three days prior to the agreement of November 26th. The witnesses attention was called to the complaint in the action of Sandberg vs. Mettler, Exhibit 7, and asked how it came about that that suit was begun. He testified, 'I will tell you how that came about from the beginning. I went up to Molson's Bank in Vancouver with Vergowe, Mettler and Wells. They wanted to borrow \$55,000, on the Powell River work. They already had fifteen or twenty thousand dollars, and Mr. Campbell, the manager of the bank, said, 'We cannot give you people any more money.' Mr. Mettler said, 'I am perfectly good for it myself.' I have a list of property here, which I handed to Mr. Campbell, and said, I will sign over some deed to secure the bank, or any indebtedness I make here. He mentioned the St. Elmo hotel on Puyallup Ave., and a few other pieces worth quite a bit of money. He



(Testimony of Peter Sandberg.)

agreed, on his return to Tacoma, to make out a deed or deeds to some of the property, as security for the sixty-five or seventy thousand dollars, so I endorsed the note. Mr. Campbell came down to Tacoma two or three weeks afterwards, and insisted on Mettler making out those deeds to the bank. He went and sold the St. Elmo hotel property and started to transfer the other property. Mr. Campbell went to Bates, Peer & Petersons' office, and insisted on filing suit against Simon Mettler and Carl Mettler to stop them getting rid of the property. He insisted on me bringing the suit. That is the way the suit was brought. Afterwards it was fixed up some way, I don't know just how. Simon Mettler never did deed this property to anybody. [187]

**Testimony of George E. Vergowe, for Defendants.**

GEORGE E. VERGOWE was then called as a witness, and testified that he was at the bank of Vancouver at the time the \$25,000 loan was obtained by the Wells Construction Company, and the manager of the bank spoke about having the Wells Construction Company and Joe Wells and myself turn over some property as security. We had the thing arranged, and made blank deeds, and took them to the bank. The bank learned that it could not hold the property so it wanted Sandberg to take it in his name, and he did not want to take it, so it was agreed it should be turned over to the Kentucky Liquor Company, and that was done. I executed a deed to forty acres, and there was nothing said at that time regarding the conveying of the property to secure any-

(Testimony of George E. Vergowe.)

body else than the Bank of Vancouver. I knew all about the property of the Wells Construction Company. Mr. Mettler, myself and my brother-in-law owned it before *the was* organized. We deeded it to the Wells Construction Company, and it was all deeded to the Kentucky Liquor Company. On the 26th of November, 1910, we turned over our stock in the Wells Construction Company to Peer and Peterson. I don't know how it happened that the Molson's Bank appears in the agreement of November 26, 1910.

**Testimony of Charles T. Peterson, for Defendants.**

CHARLES T. PETERSON, attorney for the defendants, then offered himself as a witness and testified about the transactions with Mr. Hayden as successor trustee; that he had personal charge of the affairs of the bank of Vancouver in connection with the matter testified to by the previous witness and was also attorney in the bankruptcy proceedings for the Molson Bank; and thereupon witness identified paper in bankruptcy in this court numbered 885, of Simon Mettler and the same was marked and received in evidence as plaintiff's Exhibit number 11.

Thereupon the instrument signed by Peter Sandberg on the 19th day of October, 1910, was shown witness and the following questions [188] were asked and the following objections made and the following ruling of the Court given and exceptions allowed:

“Q. Mr. Peterson, was that a part of the transaction of which Plaintiff's Exhibit 9 was originally a

(Testimony of Charles T. Peterson.)

part relative to the transaction between the two banks the Bank of Vancouver concerning which transaction Mr. Bates asked you about, and the Molson's Bank, concerned with the transactions of the Wells Construction Company?

Mr. BATES.—I object to that as not proper cross-examination.

Objection sustained. Exception allowed.

Mr. BRISTOL.—Q. In connection with the transaction which Mr. Bates asked you about, concerned with the Bank of Vancouver, is it not a fact, Mr. Peterson, that the agreement or instrument in this petition, Exhibit No. 11, is a very part of the same transaction as the instrument No. 9, so far as the trusteeship is concerned?

Mr. BATES.—I object to that as not proper cross-examination.

Objection sustained. Exception allowed.

Mr. BRISTOL.—Q. You may state whether or not Mr. Peterson, the property in Defendants' Exhibit "E," marked for identification, is not to your personal knowledge the same property in the draft of the instrument from your office, Plaintiff's Exhibit No. 9? A. It appears to be.

Mr. BATES.—I object to that as not proper cross-examination.

The COURT.—Are you asking now about the contents of the identification which is not in evidence?

Mr. BRISTOL.—I am asking about the similarity of that paper which he identified before the witness, with a paper which is in evidence, in order to con-

(Testimony of Charles T. Peterson.)

nect them up in such manner, that in view of the identified exhibit being withheld, it may appear clear, the effect of the evidence in this cause.

Mr. BATES.—He is examining him about an instrument which is not in evidence.

Objection overruled.

Mr. BRISTOL.—Q. When you prepared the verification of claim for the Bank of Vancouver, you had the knowledge, did you not, of the agreement of November 26, 1910, Plaintiff's Exhibit No. 9, and of this petition which you had filed for the Molson's Bank, Plaintiff's Exhibit No. 11? A. Yes, sir.

The WITNESS.—I want to state something further in this connection. I found upon investigation, prior to the filing of any of these papers, that the Molson's Bank and Peter [189] Sandberg had no interest in the property described in Plaintiff's Exhibit No. 9, notwithstanding the instrument's recitals.

Mr. BRISTOL.—I object to that and move to have it stricken out on the ground that it is deliberate verbal evidence affecting the terms of a written instrument which purports to have verity upon its face.

Objection overruled. Motion denied. Exception allowed.

The WITNESS.—After consulting Mr. E. M. Hayden, as trustee for the Bank of Vancouver, the petition and intervention of the Bank of Vancouver was filed, setting forth the recitals contained therein to the effect that it did have and hold certain securities, describing this property."

**Testimony of F. M. Harshberger, for Defendants.**

Thereupon F. M. Harshberger was called as a witness upon the part of the defendants to identify certain papers which were introduced in evidence as Defendants' Exhibit "E."

**Testimony of R. H. Lund, for Plaintiff (In Rebuttal).**

Thereupon R. H. LUND was called in rebuttal as a witness upon the part of the plaintiff and testified that he was a lawyer, been in Tacoma over twenty-four years, knew Peter Sandberg, Joe Wells, Simon Mettler, Vergowe and the Wells Construction Company; that he was the holder of one share of stock in the Wells Construction Company and held position of secretary for a considerable period of time up until the latter part of October or early in November, 1910. Upon being asked what was the occasion of giving up his connection he testified:

"A. It was at a meeting of the stockholders of the Wells Construction Company held in the Kentucky Building on Pacific Avenue during the latter part of October or early in November, 1910. The meeting was called for the purpose of considering the financial ability of the Wells Construction Company to continue its work, its contracts in British Columbia, and in fact to give up any further attempt to continue those contracts, which resulted in the resignation of the officers, the assignment in blank of our various certificates of stock, which were at that time turned over to Mr. Sandberg, or rather to Mr. Peterson, being there as attorney for Mr. Sandberg.

(Testimony of R. H. Lund.)

Q. At that meeting? A. Yes, sir.

Q. And that severed your relationship at that time? [190] A. Yes, sir."

Thereupon the witness testified that he had had occasion to meet and confer with Joseph Wells concerning transactions of Wells Construction Company, and that Joe Wells was general manager and had charge of the work and that he had had occasion to talk to Joe Wells concerning the transactions of Wells Construction Company with Peter Sandberg during the year 1910 and that the conversation took place in the Kentucky Building and also up at his office in the Bernice Building; and thereupon the witness was asked this question:

"Q. And may I ask you please if during that conversation Joe Wells stated to you, concerning the transactions between Peter Sandberg and the Wells Construction Company, how much, if any, was owing from Peter Sandberg to the Wells Construction Company for work done by the Wells Construction Company for Peter Sandberg on the Kentucky Building, or upon the building adjoining the Kentucky Building, described here in Defendants' Exhibit 'A'?"

Mr. BATES.—I object to that as entirely incompetent and irrelevant and not proper rebuttal, and for the further reason that no foundation has been laid for this question. If it can be anything at all it must be for the purpose of impeachment.

The COURT.—Objection sustained. You have had Mr. Wells on the stand.

(Testimony of R. H. Lund.)

Mr. BRISTOL.—It is not impeachment.

The COURT.—It is nothing else; the objection will be sustained. Exception allowed.

Mr. BRISTOL.—Q. Did you ascertain in any manner yourself how much Peter Sandberg owed the Wells Construction Company for the construction of the building that the Wells Construction Company was putting up for Peter Sandberg in 1910?

A. Yes, sir.

Mr. BATES.—I object to that as incompetent, irrelevant and immaterial and not proper rebuttal.

The COURT.—Objection sustained. You can ask him if he knows.

Mr. BRISTOL.—Q. I will ask you if you know.

A. Then I will have to modify my answer.

Q. Answer what the facts are.

A. I know from statements made to me by Mr. Wells and Mr. [191] Vergowe and Mr. Mettler and up until the 12th day of February, 1910, from the accounts and books kept of that contract.

Q. Now, you may state from all of those sources of knowledge what Peter Sandberg was owing to the Wells Construction Company in 1910, on or about approximately the time you had this meeting in the Kentucky Building, there was owing from Peter Sandberg to the Wells Construction Company?

Mr. BATES.—I object to that as incompetent and purely hearsay.

The COURT.—It is not purely hearsay, but as long as it permits an answer that may involve hearsay, the objection is sustained.

(Testimony of R. H. Lund.)

Mr. BRISTOL.—It appears from the evidence of Mr. Vergowe and Mr. Mettler and Mr. Wells, officers of this company, you have allowed statements from them to be put in here. Does your Honor hold that their statements of the accounts to one of their own coadjutors in the building is not material?

The COURT.—No, sir, I do not hold it is not material, but I do hold that before you can bring in impeaching evidence—(interrupted).

Mr. BRISTOL.—This is not impeaching testimony.

The COURT.—I have held that it was. Objection overruled. Exception allowed.

Mr. BRISTOL.—Q. What office did you hold in this company at the time? A. Secretary.

Q. And were you not also its attorney?

A. Yes, sir.

Q. You continued in that relationship until this meeting when you transferred your stock?

A. Yes, sir.

Q. Now state, if you please, whether in your capacity as secretary and attorney, you knew how much Peter Sandberg owed the Wells Construction Company on and after June, 1910, and up to the time that your relations with the company ceased?

A. I did know.

Q. Will you please state what you did know?

Mr. BATES.—Before he answers that I would like to ask him if he did not know only by what he had been told by other officers of the company.



(Testimony of R. H. Lund.)

The COURT.—You may cross-examine.

Mr. BATES.—Q. Isn't that a fact?

A. As I said before, yes, sir.

Mr. BATES.—Then I object to that on the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. BRISTOL.—You allowed Joseph Wells, over my objection, in the absence of the production of the books of that accounting, to testify by word of mouth of what those books contained, as to his knowledge of them, and coupled with that, they put in their statements in this court of the amounts that were deducted from Peter Sandberg in his account with the Wells Construction Company, and then what was deducted from the Wells Construction Company account with Peter Sandberg, the other way around. Now, here is an officer of the Wells Construction Company, secretary and attorney, proved to be in that relationship up until this transfer was made, and he says that he does know, and I have asked him for the amount of that indebtedness. Do I understand your Honor to rule that he cannot answer?

The COURT.—The Court held that as a preliminary the *prima facie* showing was sufficient to let in secondary evidence. It may be that you can convince the Court that there are some suspicious circumstances surrounding the disposition, but so far as the accounts admitted were concerned, they came so nearly being accounts stated that the Court let them in because they might appear to be part of the *res gestae*. Now, Mr. Wells stated positively what

(Testimony of R. H. Lund.)

his recollection was, so I did not require that he try to tell what was on the books. So far as Mr. and Mrs. Sandberg are concerned, Mr. Wells was a witness. If you can show that Mr. or Mrs. Sandberg have made any statements or anything inconsistent with what they testified to you may be given the benefit of that. So far as Mr. Wells is concerned, he is a witness for them.

Objection sustained. Exception allowed.

Mr. BRISTOL.—It is not impeaching testimony. My purpose—(interrupted).

The COURT.—The Court is not concerned with your purpose of it, it is the legal effect of it.

Mr. BRISTOL.—In order to save my record, I will offer to show by this witness that George Vergowe, Simon Mettler, and Joe Wells, the business transactions he had with them, and from his own relations, both as secretary and attorney, and up to and including the time that he severed his relationship with them in the fore part of November, he became acquainted with and knew the amount claimed by the Wells Construction Company from Peter Sandberg, how much approximately Peter Sandberg owed the Wells Construction Company, and can state such amount, and I will ask permission to show that amount by this witness. [193]

The COURT.—Understanding that his source of information is oral statements made by Joseph Wells in the absence of the defendants, the offer is denied.

Exception allowed.

(Testimony of R. H. Lund.)

Mr. BRISTOL.—Q. Now, can you state of your own knowledge whether or not Peter Sandberg owed the Wells Construction Company any money whatever after June, 1910, and up to the time your relations as secretary and attorney with the Wells Construction Company ceased?

A. I can state—(interrupted).

Mr. PETERSON.—We submit that can be answered yes or no.

A. What is the question?

(Question read.)

A. I can only do so from information I received as stated before.

Mr. BRISTOL.—Q. Well, that information gave you knowledge, didn't it? A. Yes, sir.

Q. I will ask you to state what your knowledge is as to the amount of that indebtedness.

Mr. BATES.—We object to that.

Objection sustained. Exception allowed."

Thereupon the witness was asked if he had any recollection of meeting Peter Sandberg in his office concerning the matter of Simon Mettler turning back notes against the Wells Construction Company and he answered that he had and said that that was at the time he testified to before the time that the stock was turned over to Mr. Sandberg and at the same meeting.

Thereupon witness identified the complaint in the case of Wells Construction Company against Joseph Wells for an accounting and the same was admitted

(Testimony of R. H. Lund.)

and received in evidence and marked Plaintiff's Exhibit No. 12.

On cross-examination this witness was examined and testified as follows:

“Q. Mr. Lund, you were the attorney for the Molsen's Bank in [194] a case tried up in the Superior Court a couple of months ago?

A. In a very insignificant way, Mr. Peterson.

Q. Well, you had been up to Vancouver rustling around in connection with that matter?

A. No, sir.

Q. You testified in that case? A. Yes, sir.

Q. You did not state in that action up there, did you, that the stock was transferred to Peer & Peterson in trust for Mr. Sandberg? A. No, sir.

Q. You were interested with those gentlemen in the trial of that case?

A. I was interested with Mr. Ballinger and his firm; yes, sir.

Q. You have been practicing law here a good many years? A. Yes, sir.

Q. You knew the law applicable to community property in this state fairly well? A. Yes, sir.

Q. You know that if a man is a stockholder in a corporation that—(interrupted).

Mr. BRISTOL.—I submit that is not proper cross-examination.

Objection sustained.

Mr. PETERSON.—It is leading up to his statement as being inconsistent with these statements now. I am simply showing his qualifications.

(Testimony of R. H. Lund.)

Objection sustained. Exception allowed.

Mr. PETERSON.—Q. Why is it that in that action you did not testify that this stock was turned over by the parties interested to Mr. Peer and myself in trust for Mr. Sandberg?

Mr. BRISTOL.—I object to that upon the ground that there is no testimony of that kind submitted to the witness, and counsel's statement of such testimony does not make it so, and the record in that case is the best evidence.

Objection overruled. Exception allowed.

A. What is the question? [195]

Q. Why was it you did not testify in that case that this stock was turned over by those parties to Peer & Peterson in trust for Mr. Sandberg?

Mr. BRISTOL.—I object to that on the ground he has not testified in that case any different than he has testified in this case. He testified here before this Court that that stock was turned over to you after that meeting for Mr. Sandberg, and I do not know what he testified in the other case, and I object until I see the record.

The COURT.—Objection overruled. As I have got the witness' testimony, the testimony was that the stock was turned over to Peer & Peterson in this meeting, and then you described them further as attorneys for Peter Sandberg.

The WITNESS.—I have no recollection of testifying to that here.

Mr. BRISTOL.—He testified that it was turned over to Peter Sandberg in this court.

(Testimony of R. H. Lund.)

The COURT.—If he says that he did not say that, I will have to disregard it.

The WITNESS.—I can say as I say now, as my only remembrance of that occurrence, that the stock was turned over to Peter Sandberg, but the final delivery was made to you as attorney for Peter Sandberg.

Mr. PETERSON.—Q. That is your conclusion of the matter?

A. That is my conclusion and my best recollection of what occurred four or five years ago. I was there and you were there.”

Thereupon witness identified a share of stock, Defendants' Exhibit “F,” being one share of the company stock of the Wells Construction Company of the par value of one hundred (\$100) dollars, issued to R. H. Lund, and assigned, November 26, 1910, by R. H. Lund to Joe Wells, which was received and offered in evidence, over the objection of the plaintiff that the same was immaterial, irrelevant and not tending to prove any fact at issue in the case.

The Court then directed that the record show that during the examination of this witness Lund, Wells and Vergowe, witnesses for the defendants, remained in the courtroom.

And the plaintiff requested of the Court findings of fact and conclusions of law; but the Court made its own findings of fact and conclusions of law as all elsewhere appear of record in this cause. [196]

**Order Settling and Allowing Bill of Exceptions.**

BE IT KNOWN that on this 10th day of February, 1917, within the time limited therefor by law and the order of this Court, there was presented to us, the Judge before whom this cause was tried, the foregoing bill of exceptions, and with it due proof of service thereof upon the defendants' attorneys, and application having been made to have such bill of exceptions settled, allowed and signed, and the Court now having fully considered said bill of exceptions and being satisfied of our own knowledge that the same contains a true and complete record of all the proceedings had upon the trial of said cause from the time the same was called for trial to the entry of final judgment therein, including a true transcript of all of the evidence admitted upon the trial, a full, true and correct statement of all evidence tendered to and excluded by the Court and of all the objections made to the admission of evidence and of all of the rulings of the Court thereon and the exceptions thereto, of all exceptions then and there taken upon the trial to all of the rulings of the Court, and of all other matters which occurred upon the trial of said cause, including all of the testimony of the various witnesses and the exhibits in connection therewith, and being fully advised in the premises,

THE COURT SETTLES, SIGNS AND ALLOWS said bill of exceptions and hereby makes the said several matters and things therein contained a part of the record in this cause.

Dated and settled this 10th day of February, 1917.

EDWARD E. CUSHMAN,

District Judge. [197]

Proposed Bill of Exceptions Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Sep. 16, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Bill of Exceptions as Settled and Certified. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 10, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [198]

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### **Petition for Writ of Error.**

The above-named plaintiff, American Surety Company of New York, respectfully shows and represents:

That on or about the 13th day of June, 1916, the above-entitled Court entered a judgment in this cause in favor of the defendant Mathilda Sandberg, and against this plaintiff, and adjudged that the community estate was in nowise liable for the demands of the plaintiff, in which judgment and adjudication and the proceedings here prior thereunto in this cause certain errors were by the Court committed to the prejudice of this plaintiff that in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, American Surety Company of New York prays that a writ of error may issue in this behalf out of the United States Circuit Court of Ap-



peals for the Ninth Circuit for the correction of the errors and adjudications so complained of and that a transcript of the record, proceedings and papers in this cause, together with the original exhibits duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW  
YORK,

By WILLIAM C. BRISTOL,  
Attorney.

Filed in the U. S. District Court, Western Dist.  
of Washington, Southern Division, Dec. 11, 1916.  
Frank L. Crosby, Clerk. By F. M. Harshberger,  
Deputy. [199]

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**Assignments of Errors Accompanying Petition for  
Writ of Error.**

The above-named plaintiff, in connection with its petition for writ of error, makes the following assignments of errors which it avers occurred upon the trial of the cause, to wit:

First. That the Court erred in denying the motion to strike out as particularly referred to in the motion those certain parts of paragraphs I, IV, V, VI and III of the answer of both defendants made jointly in said cause, and in deciding in its opinion filed herein July 31, 1915, as if and upon the ground that no such motion was made in the cause.

Second. That the Court erred in refusing to enforce the estoppel pleaded in the reply of the plaintiff.

Third. That the Court erred in rejecting evidence of the knowledge of Mathilda Sandberg of the construction of the building and the payments therefor by her husband for the community estate, and the Court erred in that respect further in sustaining objection to the evidence of Mathilda Sandberg upon the point of her knowledge of the work being done on the Kentucky Building and of her husband paying therefor out of the community funds, and in that respect erred in sustaining the objection to the question "You naturally knew that your husband would have to make payments on that building contract?" [200]

Fourth. That the Court erred in rejecting the evidence of Mathilda Sandberg upon the admissions made in the interrogatories introduced in evidence and designated and marked Plaintiff's Exhibit "A."

Fifth. That the Court erred in its ruling as follows, to wit: "It appears to me that if you depend upon the statement of Mr. Sandberg that he was interested in that company that the statement proves itself, and it does not particularly matter whether it was direct or not. If you contend that he was interested outside of that in this company, the burden is upon you and the defendants need not undertake to overcome it in this way, but I will overrule the objection just simply throwing out that as my intimation of the effect of this evidence at this time," upon the subject of the evidence as to whether or not Sandberg was or was not a stockholder of Wells Construction Company and interested therein.

Sixth. That the Court erred, over the objection of the plaintiff, in allowing the following evidence to be inquired for and adduced, to wit: That counsel for the defendants put to the witness Wells, over the objection of the plaintiff, the following question: "Did you or the Wells Construction Company or anybody in its behalf ever give Mr. Sandberg anything for signing this indemnity agreement, Plaintiff's Exhibit No. 2?" To which the Court permitted the witness to answer, over the objection then made, and the witness answered: "No, sir."

Seventh. That the Court erred in the admission of the statement, Defendants' [201] Exhibit "C," in evidence and in making the ruling in regard thereto as follows: "It will be admitted as tending to show the nature of Sandberg's interest in this company. It does not necessarily show that it is the only interest he has in that company, but it is one interest. When I say interest in the company I mean the manner in which he was in one sense interested in that company."

Eighth. The Court erred in receiving in evidence Defendants' Exhibit "D."

Ninth. That the Court erred in allowing the testimony on the following question to the witness Simon Mettler: "Was there anything said about the relations or business of the Wells Construction Company with Mr. Sandberg in building this building in connection with this matter?" and in receiving and applying the same to the relationship that the defendant Mathilda Sandberg as wife bore to the matter in issue and to the community.

Tenth. That the Court erred in allowing the evidence to be adduced and in receiving the evidence upon the following question: "Did Mr. Sandberg receive anything from you or the Wells Construction Company for signing this agreement?" propounded to the witness Simon Mettler and in ruling in the reception of said evidence that the main point which would have to be decided in the case was whether the wife Mathilda Sandberg is or was estopped and in refusing and failing to enforce the estoppel when the cause was decided.

Eleventh. That the Court erred in receiving the evidence from Simon [202] Mettler under the question: "Were Mr. or Mrs. Sandberg or either of them ever stockholders in that corporation?" and in ruling that the answer of the witness would amount only to a negative and that he did not know of their having been stockholders at any time and in permitting the witness to answer, over the objections made, "No, sir, they never had any stock in it"; and in likewise ruling upon the question to the same witness Simon Mettler "Were they ever interested in any way in the corporation?" and in ruling that that amounted to whether the witness knew or not, and that was all.

Twelfth. In the course of examination of the witness Simon Mettler on the subject of whether or not Vergowe, Mettler and Wells, in consideration of Peter Sandberg endorsing certain notes and bonds of Wells Construction Company to get credit with which to raise money to carry on its business, it was

agreed between them that they would convey by deeds property to fully secure and indemnify Peter Sandberg on account thereof, the Court erred in ruling when the following question was put to the witness Simon Mettler, referring to Sandberg: "Well, doesn't he tell the real truth about it?" The Court before the witness answered then said and ruled: "If this lawsuit has not been determined the witness might not be free to answer." And thereupon the witness was asked the following question: "Then Mr. Sandberg's statement in this complaint as to what the agreement was between you and Mr. Vergowe and Wells and himself was not correct, is that right?" and there then ensued a colloquy between Court and counsel, whereupon the Court erred in making this ruling and statement in respect of said matter: "Is it not true that if your position (referring to plaintiff's position) on the law is correct, the giving of this indemnity makes such a transaction as to bind wife and community. If you show Mr. Vergowe gave one [203] deed you could get as much advantage as though you brought in a bushel of deeds."

Thirteenth. That the Court erred in disregarding Plaintiff's Exhibits 9 and 10 and in refusing to give legal force and effect thereto in its decision of the cause.

Fourteenth. That the Court erred in allowing the witness Sandberg to answer the question: "Did you participate in any way in any of the profits of the corporation?" and in permitting the witness to be

further interrogated and answer as to whether or not he received any property or any consideration from Simon Mettler or Joseph Wells for executing and affixing his name to Plaintiff's Exhibit 2, being the indemnity agreement with the American Surety Company.

Fifteenth. That the Court erred in overruling the plaintiff's motion to strike out the testimony of said last witness Sandberg upon said point and in denying plaintiff's motion to eliminate said evidence.

Sixteenth. That the Court erred in allowing the witness Sandberg to answer and be interrogated: "Who finally took all of that property under that arrangement that was made there, the deeds?" and in ruling partially upon plaintiff's objection: "I am clear upon that" and in further ruling upon plaintiff's objection: "But it is not clear that this would be the only effect of his evidence" and in overruling plaintiff's objection and receiving said evidence.  
[204]

Seventeenth. That the Court erred in rejecting the evidence sought to be elicited from the witness Peterson and in sustaining the objections to the questions seeking to elicit said evidence, to wit, as to whether or not the instrument signed by Peter Sandberg on the 19th day of October, 1910, as Plaintiff's Exhibit No. 11, was a part of the transaction of which Plaintiff's Exhibit 9 was a part; and the Court further erred in refusing to receive said evidence and in sustaining objections thereto and in refusing to allow plaintiff to pursue that subject; and the Court further erred in

that particular in allowing the witness to answer and to state in relation to that matter: "I found upon investigation prior to the filing of any of these papers that the Molsons Bank and Peter Sandberg had no interest in the property described in Plaintiff's Exhibit No. 9, notwithstanding the instrument's recital," and in refusing to strike out such statement of the witness and in receiving and considering the same in evidence.

Eighteenth. That the Court erred in rejecting the evidence of R. H. Lund concerning whether or not Joe Wells had stated to him about the transactions between Peter Sandberg and Wells Construction Company how much, if any, was owing from Peter Sandberg to the Wells Construction Company, and in respect of the same matter the Court erred in refusing to allow the plaintiff to ascertain from the witness Lund how much Peter Sandberg owed Wells Construction Company for the construction of the building that the Wells Construction Company was putting up for Peter Sandberg in 1910.

Nineteenth. That the witness R. H. Lund having stated that he knew from [205] statements made to him by Mr. Wells, Mr. Vergowe and Mr. Mettler and from the accounts and books kept of the contract between Sandberg and Wells Construction Company until the 12th day of February, 1910, what Peter Sandberg was owing to the Wells Construction Company and the witness Lund was asked to state from that source of knowledge what there was owing from Peter Sandberg to Wells Construction Company and the Court refused to allow the witness to

state or answer the questions on that subject on the ground that it might involve hearsay, which action of the Court was error.

Twentieth. That the Court erred in holding that the testimony offered from the witness Lund on this subject was impeaching testimony and in refusing to receive and consider the same, for that it appeared that he was secretary and attorney of the company, had *source* and access to its books and records and had and knew of the facts in the matter from conversations with Vergowe, Mettler and Wells, and the Court erred in refusing to receive or consider his evidence or allow him to answer in regard to the subject matter of what Peter Sandberg was owing the Wells Construction Company on and after June, 1910.

Twenty-first. That the Court erred in making the following ruling in respect of said matter: "The Court held that as a preliminary the *prima facie* showing was sufficient to let in secondary evidence (having reference to the books). It may be that you can convince the Court that there are some suspicious circumstances surrounding the disposition, but so far as the accounts admitted were concerned they came so nearly being accounts stated that the Court let them in [206] because that might appear to be part of the *res gestae*. Now, Mr. Wells stated positively what his recollection was, so I did not require that he try to tell what was in the books. So far as Mr. and Mrs. Sandberg are concerned, Mr. Wells was a witness. If you can show that Mr. or Mrs. Sandberg have made any statements or anything inconsistent with what they testified to, you may be given the



benefit of that. So far as Mr. Wells is concerned, he is a witness for them.”

Twenty-second. The Court erred in this same connection in making the following ruling with reference to the testimony of the witness Lund and against the offer of counsel for plaintiff to show by the evidence the facts sought to be ascertained, to wit: “Understanding that his (referring to Lund) source of information is oral statements made by Joseph Wells in the presence of the defendants, the offer is denied.”

Twenty-third. The Court erred in refusing to allow the witness Lund to state what his knowledge was as to the amount of that particular indebtedness.

Twenty-fourth. That the Court erred and abused judicial discretion in the course of examination of the witness Lund in the following particulars, to wit:

“Mr. PETERSON.—Q. Why is it that in that action you did not testify that this stock was turned over by the parties interested to Mr. Peer and myself in trust for Mr. Sandberg?”

Mr. BRISTOL.—I object to that upon the ground that there is no testimony of that kind submitted to the witness, and counsel’s statement of such testimony does not make it so, and the record in that case is the best evidence. [207]

Objection overruled. Exception allowed.

A. What is the question?

Q. Why was it you did not testify in that case that this stock was turned over by those parties to Peer & Peterson in trust for Mr. Sandberg?

Mr. BRISTOL.—I object to that on the ground he

has not testified in that case any different than he has testified in this case. He testified here before this Court that that stock was turned over to you after that meeting for Mr. Sandberg, and I do not know what he testified in the other case, and I object until I see the record.

The COURT.—Objection overruled. As I have got the witness' testimony, the testimony was that the stock was turned over to Peer and Peterson in this meeting, and then you described them further as attorneys for Peter Sandberg.

The WITNESS.—I have no recollection of testifying to that here.

Mr. BRISTOL.—He testified that it was turned over to Peter Sandberg in this court.

The COURT.—If he says that he did not say that, I will have to disregard it.

The WITNESS.—I can say as I say now, as my only remembrance of that occurrence, that the stock was turned over to Peter Sandberg, but the final delivery was made to you as attorney for Peter Sandberg.

Mr. PETERSON.—Q. That is your conclusion of the matter?

A. That is my conclusion and my best recollection of what occurred four or five years ago. I was there and you were there."

And the Court erred in refusing to consider said evidence and in ruling as it is shown by the record that the Court did in respect of said evidence and that the action of the Court in these particulars was prejudicial to the rights of the plaintiff.

Twenty-fifth. That the Court erred in refusing the requests for findings of fact made by plaintiff and numbered 1 and numbered from 6 to [208] 12, both inclusive, and numbered 17 and numbered from 23 to 26, both inclusive, and numbered from 28 to 34, both inclusive, and 37 thereof, and in failing to make findings of fact upon said matters and in finding the facts contrary thereto.

Twenty-sixth. That the Court erred in refusing the conclusions of law requested by plaintiff numbered 1 to 3, both inclusive, and those numbered 4 to 9, both inclusive, and that one numbered 12, and in failing and refusing to conclude upon the law as therein requested.

Twenty-seventh. That the Court erred in holding and deciding as it did in its opinion and decision July 31, 1915: "Under these circumstances it is clear that the mere fact that the defendant Peter Sandberg had at the time of signing the application other contractual relations with the Wells Construction Company, would not make him other than an accommodation indemnitor and of itself would not make a debt growing out of the indemnity agreement the debt of his wife or the community."

Twenty-eighth. That the Court likewise erred in its opinion July 31, 1915, in holding and deciding: "The fact that Peter Sandberg paid direct certain material men furnishing supplies for the construction of the Kentucky Liquor Company Building under a contract with the Wells Construction Company is not unusual conduct under such circumstances. His becoming an indemnitor for the Wells

Construction Company is inconsistent with the claim that he then feared or believed the Wells Construction Company was not financially sound and that thereby he would protect any community interest in the completion of the [209] Kentucky Liquor Company Building.

Twenty-ninth. That the Court's rulings upon the trial with reference to the interest of the community were inconsistent, erroneous and against the law and the evidence in this, to wit: The said rulings for identification on this assignment being referred to as A, B and C:

A. "It appears to me that if you depend upon the statement of Mr. Sandberg that he was interested in that company, that the statement proves itself, and it does not particularly matter whether it was direct or not. If you contend that he was interested outside of that in this company, the burden is upon you and the defendants need not undertake to overcome it in this way, but I will overrule the objection just simply throwing that out as my intimation of the effect of this evidence at this time."

B. "It will be admitted as tending to show the nature of Sandberg's interest in this company. It does not necessarily show that it is the only interest he has in that company, but it is one interest. When I say interest in the company, I mean the manner in which he was in one sense interested in that company."

C. "Is it not true that if your position on the law is correct, the giving of this indemnity makes such a transaction as to bind wife and community, if you

show that Mr. Vergowe gave one deed, you would get as much advantage as though you brought in a bushel of deeds.”

Thirtieth: That the Court erred in deciding that Peter Sandberg alone was liable and that there was no liability of the community estate upon the evidence and law of this case.

Thirty-first. That the Court erred in making its finding and in finding and declaring that defendant Mathilda Sandberg had no knowledge or notice of the matters and things set forth in finding of fact IX made by said Court or of the pendency of said action referred to therein [210] and that said finding was against the evidence and against the law.

Thirty-second. That the Court erred in making its finding of fact numbered XII in so far as it therein found that neither of the defendants had any financial interest in the Wells Construction Company and that Plaintiff's Exhibit 2 was signed by Peter Sandberg for accommodation only and that there was no agreement or understanding that the defendant should receive anything and that Wells Construction Company in June, 1910, was in good and substantial condition, for that the same is against the law and against the evidence.

Thirty-third. That the Court erred in its finding of fact numbered XXII in finding that the agreements therein referred to were made with defendant Peter Sandberg without the knowledge, consent or acquiescence of his wife, Mathilda Sandberg, and in concluding therein “That said agreements or either of them were not for the benefit or gain or in the in-

Construction Company is inconsistent with the claim that he then feared or believed the Wells Construction Company was not financially sound and that thereby he would protect any community interest in the completion of the [209] Kentucky Liquor Company Building.

Twenty-ninth. That the Court's rulings upon the trial with reference to the interest of the community were inconsistent, erroneous and against the law and the evidence in this, to wit: The said rulings for identification on this assignment being referred to as A, B and C:

A. "It appears to me that if you depend upon the statement of Mr. Sandberg that he was interested in that company, that the statement proves itself, and it does not particularly matter whether it was direct or not. If you contend that he was interested outside of that in this company, the burden is upon you and the defendants need not undertake to overcome it in this way, but I will overrule the objection just simply throwing that out as my intimation of the effect of this evidence at this time."

B. "It will be admitted as tending to show the nature of Sandberg's interest in this company. It does not necessarily show that it is the only interest he has in that company, but it is one interest. When I say interest in the company, I mean the manner in which he was in one sense interested in that company."

C. "Is it not true that if your position on the law is correct, the giving of this indemnity makes such a transaction as to bind wife and community, if you

show that Mr. Vergowe gave one deed, you would get as much advantage as though you brought in a bushel of deeds.”

Thirtieth: That the Court erred in deciding that Peter Sandberg alone was liable and that there was no liability of the community estate upon the evidence and law of this case.

Thirty-first. That the Court erred in making its finding and in finding and declaring that defendant Mathilda Sandberg had no knowledge or notice of the matters and things set forth in finding of fact IX made by said Court or of the pendency of said action referred to therein [210] and that said finding was against the evidence and against the law.

Thirty-second. That the Court erred in making its finding of fact numbered XII in so far as it therein found that neither of the defendants had any financial interest in the Wells Construction Company and that Plaintiff's Exhibit 2 was signed by Peter Sandberg for accommodation only and that there was no agreement or understanding that the defendant should receive anything and that Wells Construction Company in June, 1910, was in good and substantial condition, for that the same is against the law and against the evidence.

Thirty-third. That the Court erred in its finding of fact numbered XXII in finding that the agreements therein referred to were made with defendant Peter Sandberg without the knowledge, consent or acquiescence of his wife, Mathilda Sandberg, and in concluding therein “That said agreements or either of them were not for the benefit or gain or in the in-

terest of the community consisting of the defendants or for the use, benefit or interest of the defendant Mathilda Sandberg," for it is against the law and against the evidence.

Thirty-fourth. That finding of fact XXIII made by the Court is against the evidence, inconsistent with the other findings of fact and against the law and disregards and ignores the rule of law that the husband is the manager of the community estate and the agent of the wife. [211]

Thirty-fifth. That the finding of fact XXV made by the Court is against the evidence of R. H. Lund and in disregard of said evidence and based upon the ruling of the Court excluding the evidence of said Lund and in disregard of the same, for that said stock referred to in said corporation was placed in the hands of Newton H. Peer and Charles T. Peterson as trustees for the use and benefit of Peter Sandberg.

Thirty-sixth. That the third conclusion of law made by the Court is erroneous and contrary to the law and inconsistent with the findings of fact which the Court did make and against the findings of fact requested by the plaintiff which the Court refused to make and against the evidence.

Thirty-seventh. That conclusion of law IV made by the Court is erroneous and contrary to the law and inconsistent with the findings of fact which the Court did make and against the findings of fact requested by the plaintiff which the Court refused to make and against the evidence.

Thirty-eighth. That the Court erred in entering



the judgment and order of the 13th of June, 1916, for that it is against the law, against the evidence, and contrary to the evidence; that in entering the judgment of the 13th of June, 1916, the Court erred in limiting the right of recovery to plaintiff to Peter Sandberg alone and denying any right of recovery against the community property.

WHEREFORE, the above-named plaintiff in error prays that the aforesaid judgment of the above-entitled Court in this cause entered [212] June 13, 1916, be reversed so far as it limits recovery of plaintiff to Peter Sandberg alone and that it be adjudged and decided that plaintiff have the right to recover against the community estate.

WILLIAM C. BRISTOL,  
Attorney for Plaintiff in Error.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [213]

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**Order Allowing Writ of Error and Fixing Amount of Bond.**

This cause being further heard on the petition of the plaintiff for allowance of a writ of error, and there being filed therewith an assignment of errors to be urged by plaintiff, praying also that a transcript of the record and proceedings and papers in this case and the original exhibits duly authenticated upon which the judgment and adjudication in this cause were rendered may be sent to the United States Circuit Court of Appeals for the Ninth Circuit and

that such other and further proceedings may be had therein as proper in the premises, it is by the Court here now

CONSIDERED, ORDERED AND ADJUDGED that a writ of error as prayed for by the plaintiff be and the same is hereby allowed, and the plaintiff being a surety company authorized to do business in Washington may file its bond herein in the full and just sum of five hundred dollars (\$500) as security for all damages and costs that the defendants above-named may sustain in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 11th day of Dec., 1916.

EDWARD E. CUSHMAN,  
District Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [214]

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**Bond on Writ of Error.**

United States of America,  
District and State of Washington,—ss.

KNOW ALL MEN BY THESE PRESENTS, that American Surety Company of New York, the plaintiff above named and authorized to do a surety business of and in this district and the State of Washington, does hereby bind and hold itself to pay unto the defendants Peter Sandberg and Mathilda Sandberg the full and just sum of five hundred dollars (\$500), to be paid to the said defendants, his

or their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, American Surety Company of New York binds itself, its successors and assigns jointly and severally by these presents.

Sealed and executed this 11th day of December, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, the above-entitled cause was lately heard and determined in the above-entitled court and a judgment was rendered against American Surety Company of New York and in favor of Mathilda Sandberg and the community estate of Peter Sandberg and Mathilda Sandberg, and the plaintiff having petitioned for and obtained the allowance of a writ of error and filed a copy thereof in the clerk's office to reserve said judgment in said cause and the citation having been issued and directed to the defendants admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city and county of San Francisco within thirty (30) days therefrom.

Now, the condition of the above obligation is such that if the said American Surety Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its said writ of error good, then the above obligation to be [215]

void, otherwise it is to remain in full force, virtue and effect.

AMERICAN SURETY COMPANY OF NEW  
YORK.

By C. MILFORD COYE,  
Resident Vice-president.

By C. E. DUNKLEBERGER,  
Resident Asst. Secretary.

[Corporate Seal of American Surety Company of  
New York.]

Sealed and delivered in the presence of:

F. E. GRIGSBY,  
D. M. SAWTELLE,

Approved:

EDWARD E. CUSHMAN,  
District Judge.

Filed in the U. S. District Court, Western Dist. of  
Washington, Southern Division. Dec. 11, 1916.  
Frank L. Crosby, Clerk. By F. M. Harshberger,  
Deputy. [216]

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**Stipulation to Transmit Original Exhibits to  
Appellate Court.**

It is stipulated by and between counsel for the respective parties, in order to shorten the record herein and obviate cost of printing, that all of the original exhibits introduced by either party hereto as now in possession of the clerk of this court may and shall be, under the order of this Court, transmitted direct to the United States Circuit Court of Appeals for the Ninth Circuit with the transcript of record herein

for use by either party in the United States Circuit Court of Appeals upon the hearing of the writ of error in this cause, and that the Court here may make such order as is customary in such cases for the transmission of such original exhibits.

Dated at Tacoma, Washington, November 28, 1916.

BATES, PEER & PETERSON,  
Attorneys for Defendants.

W. C. BRISTOL,  
Attorney for Plaintiff.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Dec. 4, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.  
[217]

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**Order Transmitting Original Exhibits as Part of the Record.**

It having been stipulated by respective counsel, in order to shorten the record and obviate unnecessary printing, that the original exhibits herein may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record herein, it is by the Court here

CONSIDERED, ORDERED AND ADJUDGED that the clerk of this court in making up the proceedings may and shall transmit with the original record herein all of the original exhibits as introduced in evidence in this cause to the United States Circuit Court of Appeals for the Ninth Circuit, at San Fran-

cisco, as part of the record herein for consideration of the Appellate Court.

Given and done in open court this 4th day of Dec., 1916.

EDWARD E. CUSHMAN,  
District Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Dec. 4, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [218]

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**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the case of American Surety Company of New York, a Corporation, Plaintiff, versus Peter Sandberg and Mathilda Sandberg, his wife, Defendants, as required by praecepe of counsel filed and shown herein, and as the originals thereof appear on file and of record in my office in said District at Tacoma; and that the same constitute my return on the annexed Writ of Error herein.

I further certify and return that I hereto attach and herewith transmit the original Writ of Error and original Citation, together with two original Orders Extending Time to File Return on Writ of

Error; and that, under separate cover, duly certified, I am transmitting herewith the original exhibits called for in Stipulation of Counsel and Order of Court for removal of same herein.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges as incurred and paid in my office by and on behalf of the plaintiff in error herein, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate and return, 589 folios at 15¢ each.....	\$88.35
Certificate of Clerk to Transcript, 3 folios at 15¢ each.....	.45
Seal to said Certificate.....	.20
Certificate and Seal to original exhibits, 3 folios .....	.65

[219]

ATTEST my hand and the seal of said District Court at Tacoma, in said District, this 10th day of March, A. D. 1917.

[Seal]

FRANK L. CROSBY,  
Clerk.

By F. M. Harshberger,  
Deputy Clerk. [220]

**Writ of Error.**

The United States of America,—ss.

The President of the United States, WOODROW WILSON, to the Honorable Judge of the District Court of the United States of the Western District of Washington, Southern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between American Surety Company, of New York, a corporation, plaintiff in error, and Peter Sandberg and Matilda Sandberg, his wife, defendants in error, a manifest error has happened to the damage of the plaintiff in error as by said complaint appears, and we being willing that error, if any hath been, should be corrected and a full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco, in the State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the United States Court of Appeals may cause further to be done therein to correct the error what of right, and according



to the laws and customs of the United States should be done.

Witness the Honorable EDGAR DOUGLASS WHITE, Chief Justice of the United States, this 11th day of December, A. D. 1916.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Stambak,

Deputy Clerk.

No. ——. In the Circuit Court of Appeals of the United States for the Ninth Circuit. American Surety Company of New York, Plaintiff in Error, vs. Peter Sandberg and Matilda Sandberg, His Wife, Defendants in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

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**Citation on Writ of Error.**

United States of America,

District of Washington,—ss.

To Peter Sandberg and Matilda Sandberg, His Wife,  
and to Bates, Peer & Peterson, Their Attorneys  
of Record, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Washington, wherein American Surety Com-

pany of New York, a corporation, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and particularly justice should not be done to the parties in that behalf.

Given under my hand and seal at Seattle in said District, this 11th day of December, in the year of our Lord one thousand nine hundred and sixteen.

[Seal]

EDWARD E. CUSHMAN,

Judge.

District of Washington,  
County of Pierce,—ss.

Due service of the within citation on writ of error is hereby accepted in Tacoma, Pierce County, Washington, this 11th day of December, 1916, by receiving a copy thereof duly certified to as such by W. C. Bristol, attorney for plaintiff in error.

BATES, PEER & PETERSON,

Attorneys for Defendants in Error.

No. ——. In the Circuit Court of Appeals of the United States for the Ninth Circuit. American Surety Company of New York, Plaintiff in Error, vs. Peter Sandberg and Matilda Sandberg, His Wife, Defendants in Error. Citation on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

**Order Extending Time to File Transcript on Writ of Error.**

This cause being further heard on the application of the plaintiff in error for an extension of time to file transcript on writ of error,

IT IS, by the Court, here now CONSIDERED, ORDERED AND ADJUDGED that the time in which to file transcript on writ of error is hereby extended sixty (60) days from and after the 29th day of the time allowed by law for lodging said transcript in the Circuit Court of Appeals.

ORDERED, this 11th day of December, 1916.

EDWARD E. CUSHMAN,

District Judge.

In the United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company of New York, a Corporation, Plaintiff in Error, vs. Peter Sandberg and Mathilda Sandberg, His Wife, Defendants in Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 11, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

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**Order Extending Time to and Including April 5, 1917, to File Record.**

For good cause shown, it is by the Court here now CONSIDERED, ORDERED AND ADJUDGED that the time within which to file in the United States Circuit Court of Appeals for the Ninth Circuit, the

transcript or record on Writ of Error herein is hereby extended to and including the 5th day of April, A. D. 1917.

Dated this 2d day of March, A. D. 1917.

EDWARD E. CUSHMAN,  
District Judge.

In the United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company of New York, a Corporation, Plaintiff in Error, vs. Peter Sandberg and Mathilda Sandberg, His Wife, Defendants in Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Mar. 2, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

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[Endorsed]: No. 2951. United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company of New York, a Corporation, Plaintiff in Error, vs. Peter Sandberg and Matilda Sandberg, His Wife, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed March 14, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.